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PRACTICE OF THE SUPREME COURT ^{C#}

OF NEW SOUTH WALES,

AT

COMMON LAW,

INCLUDING THE

COMMON LAW PROCEDURE ACT, 1899,

AND OTHER ACTS RELATING TO THE SUBJECT,

TOGETHER WITH THE

GENERAL RULES OF COURT

EDITED WITH

NOTES AND INDEX,

BY

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PREFACE.

THE EDITORS have endeavoured in this work to place before the profession, in as convenient and concise a form as possible, an annotated collection of the various Statutes and Rules relating to the procedure of the Supreme Court in its Common Law Jurisdiction.

It is now several years since Mr. Pilcher's very useful edition of the Common Law Procedure Acts was published. Since then, those Acts have been consolidated, new enactments relating to practice have become law, new Rules brought into force; finally, the whole of the Rules have been consolidated; and the cases in our own Courts on practice have so multiplied that it became evident a new work on the subject was urgently needed by the profession.

Before the work of consolidation was determined upon, Mr. Rolin, one of the present Editors, and Mr. Ferguson, also of the Bar, began to prepare an Annotated Collection of the Statutes and Rules on the subject, but this was delayed owing to the announcement of the proposed consolidation. Mr. Ferguson, subsequently, owing to the pressure of other business, found it impossible to give up the time necessary for the preparation of a work of this nature. The present Editors then undertook the work.

As in Mr. Pilcher's edition of the Common Law Procedure Acts, the notes to the English Acts contained in Mr. Day's book have been in part reprinted. On many subjects, however, such as New Trial, Discovery and Inspection, Attachment of Debts, Privy Council Appeals, and others, the cases in our own Courts are so numerous and exhaustive that it has been thought sufficient to confine the notes to those cases and the later English decisions.

The Editors desire to express their acknowledgment of the assistance rendered them in the revision of the proofs and otherwise by Mr. C. A. White, Barrister-at-Law.

T. ROLIN.

GEO. M. LONG INNES.

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ADDENDA ET CORRIGENDA.

- Page 43, line 48—For “*Milford*” read “*Mitford*.”
- „ 64, line 14—For “*pleading is a demurrer*” read “*demurrer is a pleading*.”
- „ 113, line 19—For “*Jones*” read “*Davis*.”
- „ 147, line 7 from bottom—For “*L. Palk*” read “*Lo Pak*.”
- „ 199, line 19 from bottom—Omit “*and Commander in Chief*.”
- „ 237, line 20 from bottom—For “*Casel*” read “*Cusel*.”
- „ 240, line 33—For “*Dobbs*” read “*Dabbs*.”
- „ 327, line 19 from bottom—For “*Benang*” read “*Bonang*.”
- „ 403, line 8—For “*do*” read “*did*,” and add, “*but see now R. 185*.”
-

REGISTRATION OF FIRMS ACT.

By the “Registration of Firms Act 1902,” any firm or person carrying on business in New South Wales under any firm-name must register their or his firm name and the full names of the person or persons carrying on the business. By ss. 11 and 12 it is provided:—

11. (1) Where any firm or person by this Act required to send or deliver any statement to the Registrar-General has therein made default, and during such default commences any suit or action in any court in the firm-name or for a cause of action arising out of any dealing by such firm or person in the firm-name, such court shall order the firm or person in default to send or deliver to the Registrar-General the proper statement as required by this Act, and may stay all proceedings in the suit or action until the order be complied with, or allow proceedings to be continued on an undertaking to comply with such order within a time to be limited by the court.

(2) The power by this section given to the court may be exercised by a Supreme Court Judge in chambers, or by a District Court Judge, or by a police or stipendiary magistrate, or by two or more justices sitting in petty sessions.

12. If any firm or person required to be registered as provided in this Act shall fail to register accordingly, all proceedings in any court of competent jurisdiction may be taken and prosecuted against such firm or person in the name under which such firm or person is carrying on business, and such name shall for the purposes of such proceedings be a sufficient designation of such firm or person in all writs, summonses, complaints, and other legal documents and instruments: Provided however that nothing in this section shall be construed to exempt any firm or person from compliance with any of the provisions of this Act.

THE COMMON LAW PROCEDURE ACT, 1899.

COMMISSIONER'S NOTE.

THIS Act consolidates the whole or part of the following Acts:—

4 Vic. No. 6;
4 Vic. No. 22;
5 Vic. No. 9;
10 Vic. No. 10;
12 Vic. No. 1;
15 Vic. No. 3;
16 Vic. No. 14;
17 Vic. No. 21;
18 Vic. No. 6;
20 Vic. No. 8;
20 Vic. No. 31;
22 Vic. No. 18;
22 Vic. No. 25;
24 Vic. No. 8;
46 Vic. No. 17;
47 Vic. No. 7;
50 Vic. No. 26;

TABLE.

Showing how the sections of Acts consolidated have been dealt with

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18	47-8	Proviso as to competency of witnesses omitted as obsolete.
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25	25, 208, 269 ..	The part relating to feigned issues to be dealt with in another Bill.
4 Vic. No. 22, s. 15..	108	Part relating to criminal proceedings to be dealt with in Crimes Bill.
23	268	Not repealed; to be dealt with in Supreme Court Bill.
26	121-2	
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27		Landlord and Tenant Act, 1899, s. 56.
28-31		To be dealt with in other Bills.
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7		Repealed by 16 Vic. No. 14, s. 1.
8		To be dealt with in Equity Bill.
9		Repealed by 22 Vic. No. 14, s. 1.
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11		Repealed by Auctioneers Licensing Act.
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47 Vic. No. 7, s. 3..	120	
50 Vic. No. 26, s. 1..		To be dealt with in Defamation Bill.
2	80	Not repealed as it applies to proceedings in other Courts. To be dealt with in Defamation Bill.

ACT No. XXI., 1899.

An Act to consolidate the enactments relating to the process, practice, and mode of pleading at law in the Supreme Court. [Assented to 20th November, 1899.]

BE it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and Legislative Assembly of New South Wales in Parliament assembled, and by the authority of the same, as follows :—

PART I.

PRELIMINARY.

1. This Act may be cited as the "Common Law Procedure Act, 1899," and is divided into parts, as follows :—

Short title and
division.

PART I.—PRELIMINARY.—SS. 1-3.

PART II.—WRIT OF SUMMONS.—SS. 4-24.

PART III.—APPEARANCE AND PROCEEDINGS IN DEFAULT OF APPEARANCE.—SS. 25-33.

PART IV.—JOINDER OF PARTIES.—SS. 34-48.

PART V.—JOINDER OF CAUSES OF ACTION.—SS. 49-50.

PART VI.—DETERMINATION OF QUESTIONS RAISED BY CONSENT WITHOUT PLEADING.—SS. 51-57.

PART VII.—PLEADING.—SS. 58-101.

PART VIII.—DISCOVERY AND INSPECTION, AND NOTICES TO ADMIT AND PRODUCE.—SS. 102-107.

PART IX.—CHANGE OF VENUE.—SS. 108-109.

PART X.—COUNTERMAND OF TRIAL, OR DEFAULT IN PROCEEDING THERETO.—SS. 110-111.

PART XI.—PROCEEDINGS AT THE TRIAL.—SS. 112-116.

PART XII.—REMITTING ISSUES AND INQUIRIES TO SUBORDINATE TRIBUNALS.—SS. 117-129.

PART XIII.—JUDGMENT AND EXECUTION.—SS. 130-139.

PART XIV.—INTEREST AND DAMAGES IN THE NATURE OF INTEREST.—SS. 140-143.

PART XV.—REVIVOR, SCIRE FACIAS, &C.—SS. 144-151.

PART XVI.—DEATH OR MARRIAGE OF PARTIES.—SS. 152-159.

PART XVII.—NEW TRIAL, ARREST OF JUDGMENT, AND JUDGMENT NON OBSTANTE VEREDICTO.—SS. 160-164.

PART XVIII.—MANDAMUS AND INJUNCTION.—SS. 165-179.

PART XIX.—ATTACHMENT OF DEBTS.—SS. 180-187.

**C.L.P. Act,
S. 1.**

PART XX.—ABSENT DEFENDANTS.—SS. 188–208.

PART XXI.—EJECTMENT.—SS. 209–251.

PART XXII.—HABEAS CORPUS.—SS. 252–254.

PART XXIII.—AFFIDAVITS AND EVIDENCE.—SS. 255–258.

PART XXIV.—AMENDMENT.—SS. 259–260.

PART XXV.—COSTS.—SS. 261–267.

PART XXVI.—RULES AND FORMS.—SS. 268–270.

Repeal.

First Schedule,

Officers under
Acts hereby
repealed.Rules of Court
under Acts here-
by repealed.

2. (1) The Acts mentioned in the First Schedule to this Act are to the extent therein expressed hereby repealed.

(2) Every person appointed under any enactment hereby repealed and holding office at the time of the passing of this Act shall be deemed to have been appointed hereunder.

(3) All rules of Court made under the authority of any enactment hereby repealed, or applicable to any proceedings thereunder, and being in force at the time of the passing of this Act shall be deemed to have been made under the authority of, and shall apply to proceedings under, this Act.

(4) Wherein any such rule reference is made to the provisions of any enactment repealed and re-enacted with or without modification by this Act, such rule shall be read as if the reference had been to the provisions so re-enacted.

Interpretation.

3. In this Act, unless the context or subject matter otherwise indicates or requires,—

“Court” means the Supreme Court of New South Wales.

“Judge” means a Judge of the Court.

“Prescribed” means prescribed by Rules of Court.

“Property” in Part XX includes land, money, securities for money, chattels, bills, bonds, and other property of whatsoever nature.

PART II.**WRIT OF SUMMONS.**Personal actions
against defend-
ants within the
jurisdiction.
17 Vic. No. 21,
s. 2.

4. (1) Every personal action brought in the Court, if the defendant is residing or supposed to reside within the jurisdiction of the Court, shall be commenced by writ of summons in the Form No. 1 contained in the Second Schedule to this Act.

(2) In every such writ and in every copy thereof shall be mentioned the place of the residence or supposed residence of the defendant, or wherein the defendant is or is supposed to be.

(3) Such writ shall be issued by the prothonotary or such other officer as the Court directs.

Personal action.—The use of the term *personal action* had the effect of excluding from the operation of this and other sections, actions of right of dower, dower and *quare impedit*, which are *real actions*, but which are now practically obsolete**Shall be commenced by writ of summons.**—A writ must issue before the execution of a warrant of attorney: *Want v. Milne*, (1871) 11 S.C.R. 49; *Pennington v. Manby*, (1862) 1 S.C.R. 349.The Statute prescribes the making of certain endorsements on the writ: see sections 8, 10 and 24 (*post*).

In the Form No. 1. contained in the Second Schedule to this Act.—The writ of summons must be in the above *form*, though the omission to insert in, or indorse on it, any of the matters required to be so inserted or indorsed will not make the writ void, but only subject the plaintiff to have it set aside as irregular, or amended at his cost (s. 20, *post*), and the use of Forms 3 or 4 by mistake is amendable : s. 21. Under the former (English) practice a writ commanding the defendant to enter an appearance “in our Court of _____ at Westminster” was set aside although it was tested in the name of the Chief Baron : *Stephenson v. Thorne*, 2 D. & L. 230. **C.L.P. Act, s. 4.**

It issues in the name of the sovereign, whose style and title ought to be strictly followed : *Hall v. Redington*, 5 M. & W. 605 ; and is directed to the defendant, whose christian and surname ought to be correctly stated, though he may be addressed by the name which he bears by reputation : *Williams v. Bryant*, 5 M. & W. 447. Section 65 (*post*) enables parties to written instruments to be designated by the initials or contractions used by them in such instruments. A peer or titled person ought to be described by his proper title : *Wells v. Lord Suffield*, 5 D. & L. 177. Misnomers may be rectified by an amendment under a judge's order at the cost of the plaintiff : s. 20 (*post*) and note.

Where no defendant's name appeared on the writ, which was directed to “The President and Committee of the Sydney Mechanics School of Arts,” the writ was set aside : *Godfrey v. President, &c., of the School of Arts*, (1894) 10 W.N. 146.

The blank left in the form for the number of days for appearance is supplied by the Rules : *Lazarus v. Stutchbury*, (1886) 2 W.N. 114 ; on appeal 7 N.S.W.R. 328 ; 3 W.N. 23. See RR. 33, 34, (*post*).

Plaintiff or defendant in person.—For the necessary proceedings where a party sues or defends in person, see R. 395 (*post*).

A corporate body should be sued by its corporate name ; and can only sue by an attorney : *The Equitable Life Assurance Society v. Cutler*, (1887) 4 W.N. 60.

The place of the residence or supposed residence of the defendant.—The place of the “residence or supposed residence” of the defendant must be stated. The omission of this statement is an irregularity : *Ross v. Gandell*, 7 C.B. 766 ; amendable, however, under s. 20 (*post*). Defendant may move to set aside the writ for irregularity if his residence be wrongly stated : *Fink v. Oliver*, (1885) 1 W.N. 108.

If the defendant being a British subject, reside out of the jurisdiction, the plaintiff should proceed under s. 18 (*post*), or under the (Commonwealth) Service and Execution of Process Act, 1901, (*post*) ; unless it is possible to serve the defendant in the State, when a writ under this section may be served and the defendant treated as residing where he is temporarily resident : *Davis v. Harley*, (1884) 5 N.S.W.R., 213.

If the defendant be within the jurisdiction it is immaterial where the cause of action arose : *Horner v. Hodgson*, (1886) 3 W.N. 58. If the defendant be out of the jurisdiction, but not a British subject, see s. 19.

Name of plaintiff.—The name of the plaintiff is also to be stated ; but a writ cannot be set aside for a mere misnomer of the plaintiff : *Walker v. Parkins*, 2 D. & L. 298 ; but this may be amended on plaintiff's application : *Ye Sing v. Lion Insurance Company*, (1884) 1 W.N. 61.

Addition and character of party.—The addition of neither party is required, nor is it necessary to state whether the parties sue or are sued in a representative capacity, as executor, administrator, or assignee. It is better not to do so : — *administrator v. —*, 1 Dowl. 97, n. Where a writ issued in the name of plaintiffs “as directors of, &c.” the Court ordered the declaration to be amended so as to correspond with the writ : *Thorn v. Berriman*, (1864) 3 S.C.R. 124. It may be desirable sometimes, however, to show to the defendant, by the writ, either that the plaintiff sues or that he is himself sued *en autre droit* ; for instance, to prevent an executor paying another creditor : *Rees v. Morgan*, 5 B. & Ad. 1035.

The writ is issued by the Court, but it is prepared by the plaintiff or his attorney who also prepares a *præcipe* for it : R. 28 (*post*).

The indorsements being made on the writ according to the ss. 8, 10 or 24, it must be sealed at the office of the Court, and the *præcipe* left there. Concurrent writs may be issued (s. 11, *post*).

Alteration in writs.—Any alteration in the writ without its being resealed before service would render it void : *Siggers v. Sansom*, 2 Dowl. 745.

Where a writ was issued by mistake against a defendant in a wrong name it was held that it might, before service, be corrected and resealed without altering the *teste* : *Gibson v. Vorley*, 7 E. & B. 49.

**C.L.P. Act,
8. 4.**

The Court has no power to alter the date of a writ of summons wrongly dated by mistake, even to prevent the operation of the Statute of Limitations, unless it be to make the writ accord with the *præcipe*; and appearance to a writ so altered under the order of a judge at chambers has been held no waiver, upon the ground that the writ so amended was void, and not merely irregular: *Clarke v. Smith*, 2 H. & N. 753; *Kirk v. Dolby*, 6 M. & W. 636.

Memorandum.—The memorandum required the writ to be served within six calendar months; but see now R. 30 (*post*). If not so served, it must be renewed in the mode pointed out by s. 12 (*post*). A defendant may appear to a writ after the (six) months have expired: *Richardson v. Daley*, 7 Dowl. 25; and accept service after that period: *Coates v. Sandy*, 9 Dowl. 381; or apply to set it aside: *Hemp v. Warren*, 2 Dowl. N.S. 758. If the writ did not contain the memorandum formerly required it could be set aside as irregular: *Day v. Holly*, 2 Dowl. N.S. 974. Omissions and irregularities may now be amended under s. 20 (*post*).

Prothonotary or such other officer.—By s. 4 of the General Legal Procedure Act, 1902, the judges may by rule empower commissioners for affidavits to issue writs: see that Act and R. 29 (*post*).

No form or cause of action to be mentioned in writ.

17 Vic. No. 21, s. 3.

Names of defendants.

Ibid. s. 4.

5. It shall not be necessary to mention any form or cause of action in any writ of summons or in any notice of writ of summons issued under the authority of this Act.

6. Every writ of summons shall contain the names of all the defendants, and shall not contain the name or names of any defendant or defendants in more actions than one.

The names of all the defendants, etc.—If persons are joined as defendants who are not liable as such, the misjoinder may be rectified, under s. 40 (*post*) at any time before, and even at the trial; but it is different if too few defendants are sued for s. 42 (*post*) only enables the plaintiff to amend the writ and subsequent proceedings after a plea in abatement for non-joinder; and the Courts have decided that they cannot amend a writ by adding the name of the defendant: *Goodchild v. Leadham*, 1 Exch. 707.

In the case of *Godfrey v. The President, &c., of the School of Arts* (1894) 10 W.N. 146, the Court set aside the writ of summons on the ground that no defendants' names appeared therein.

Date and teste:

Ibid. s. 5.

7. Every writ of summons shall bear date on the day on which the same is issued, and shall be tested in the name of the Chief Justice, or in case of a vacancy of such office then in the name of the senior Puisne Judge.

Shall bear date.—If dated on a different day from that on which it was issued, the writ may be set aside as irregular; but it may be amended in this respect so as to correspond in date with the *præcipe*: *Kirk v. Dolby*, 6 M. & W. 636. Except in this case the date cannot be altered: *Clarke v. Smith*, 2 H. & N. 753. If it bears no date at all, it is, if not a nullity, at least irregular: *Ball v. Hamlet*, 3 Dowl. 188; *Wells v. Dawson*, 2 Dowl. N.S. 468. But if dated on a Sunday it is a nullity: *Hanson v. Shackleton*, 4 Dowl. 48; and the Court will take judicial notice that the date of the writ fell on Sunday (*Id.*). The date may be stated in words at length, or in figures: *Eyre v. Walsh*, 6 Taunt. 333.

And shall be tested, etc.—*Hill, J.*, at Chambers, refused to set aside a writ whereon the christian name of the Chief Justice was mis-stated: *Folkard v. Fitzstubs*, 1 F. & F. 376.

The writ should (*seem*) be signed by the officer issuing it as well as tested. But where the copy served on the defendant did not contain the date or the signature of the magistrate who issued the original writ, it was held that the omission was an irregularity only, and that the defendant could not take advantage of it except by an application before the filing of the declaration: *Sevil v. Heath*, (1877) Knox 359.

Indorsement of name and abode of attorney,

Ibid. s. 6.

8. (1) Every writ of summons shall be endorsed with the name and place of abode of the attorney actually suing out the same, and also when such attorney sues out the same as agent for an attorney in the country with the name and place of abode of such attorney in the country.

(2) If no attorney is employed to sue out the writ, it shall be endorsed with a memorandum expressing that the same has been sued out by the plaintiff in person, mentioning the city, town or parish, and also the name of the hamlet, street, and number of the house of such plaintiff's residence, if any such there be.

**C.L.P. Act,
S. 8.**
or of plaintiff
in person.

Name and place of abode of the attorney.—A defendant is entitled to full information as to the person to whom he may address himself for a settlement of the action against him. The information, when the writ is issued out by an attorney, is not required to be so particular as when it is sued out by a plaintiff in person, as a attorney may be more easily found out. "Gray's Inn, London," has been held sufficient designation of an attorney; "Southampton Buildings," insufficient. Where the writ is sued out by a firm of attorneys, the name of the firm ought to be indorsed *Engleheart v. Eyre*, 2 Dowl. 145; *Hartley v. Rodenhurst*, 4 Dowl. 748.

A writ issued by an attorney whose office had not been registered with the Prothonotary was set aside with costs against the attorney (see RR. 15, 16, *post*): *Black v. Chinnery*, (1894) 11 W.N. 54; but see R. 396 (*post*).

Plaintiff in person.—By R. 359, a party suing a person must register an address for service with the Prothonotary: see that Rule, and R. 396 (*post*).

Address of plaintiff.—Where the writ is sued out by the plaintiff in person, the directions of the above section ought to be most strictly followed. "No. 1, Clifford's Inn Passage, Fleet Street, in the city of London," has been held a sufficient address: *Arden v. Jones*, 4 Dowl. 120; the words *city, town, parish* being used disjunctively; but "W.I., 32 Great J. Street, Bedford Row, agent for the plaintiff in person, who resides at Barmouth," has been considered an insufficient statement: *Lloyd v. Jones*, 1 M. & W. 549. The amending of this statement is within s. 20 (*post*).

In a case where an attorney sued in person, it was held that he was properly described under this section as of the place where he carried on his business: *Ablett v. Basham*, 5 E. & B. 1019. See also decisions on meaning of words "residence," "place of abode," and "dwelling," collected in *Attenborough v. Thompson*, 2 H. & N. 559; and in *Kerr v. Haynes*, 29 L.J. Q.B. 70. A corporation must sue by attorney: *Equitable Life Society v. Cutter*, (1887) 4 W.N. 60.

9. (1) Every attorney whose name is endorsed on any writ of summons shall on demand in writing made by or on behalf of any defendant declare forthwith whether such writ has been sued out by him or with his authority or privity.

Attorney on demand to declare whether writ sued out by his authority.

17 Vic. No. 21, s. 7.

(2) If he answers in the affirmative then he shall also, if the Court or a Judge so orders, declare in writing within a time to be allowed by the Court or Judge, the profession, occupation, or quality, and place of abode of the plaintiff, on pain of being guilty of a contempt of Court.

May be ordered to declare plaintiff's name and abode.

(3) If he answers in the negative, all proceedings upon such writ shall be stayed and no further proceedings shall be taken thereupon without leave of the Court or a Judge.

Stay of proceedings on writ issued without authority.

On demand in writing.—This demand ought to be made in an early stage of the proceedings.

If the Judge or Court so orders.—A judge will not in general refuse to order the information to be given although it be sought for a collateral purpose: *Cox v. Bockett*, 18 C.B., N.S. 239; 34 L.J.C.P. 125.

If the plaintiff's attorney answer in the affirmative, and the defendant desire to know the plaintiff's abode, profession, &c., he should take out a chamber summons for such particulars.

The information ought to be sufficient, and not illusory. "Peele's Coffee House, Fleet Street," has been held not a sufficient statement of a plaintiff's residence: *Hodgson v. Gamble*, 3 Dowl. 174. If the information is insufficient, and its sufficiency must depend on the circumstances of each case, a summons should be taken out for better particulars. It will be for the court or a judge to decide whether the particulars furnished are sufficient, or whether the defendant should apply for an attachment for contempt: *Smith v. Bond*, 11 M. & W. 326. Where an attorney refused to comply

C.L.P. Act, with a judge's order, the court allowed the defendant to *non pros.* the plaintiff in the action, and ordered the attorney to pay the costs : *Gynn v. Kirby*, 1 Str. 402. Where an order omitted to specify the time within which the declaration was to be made but provided for a stay of proceedings after the lapse of a certain number of days from the making of the order until the declaration should be made, it was held a bad order under this section ; but it was suggested that if it had been made a rule of court it might have been proceeded upon under the general jurisdiction of the court : *Malpas v. Mudd*, 3 H. & N. 246 ; *sed quære.*

If the attorney declares the writ not to have been issued by him, or with his authority or privity, the defendant, upon making an affidavit of the facts can obtain an order to stay proceedings.

An attorney suing for a common law corporation must be retained under its common seal : *Arnold v. Poole* 2 Dowl. N.S. 574 ; otherwise he cannot recover his bill of costs. In the case of a company incorporated under the Companies Act, not so : see *Gale v. The Wingello Coal Mining Co.*, (1890) 11 N.S.W.R. 79 ; 6 W.N. 136.

In the case of *Aktiebolaget Molubacka Trysil v. Burns*, (1893) 14 N.S.W.R. 94 ; 9 W.N. 107, it was held that in an action brought by a corporation it was not necessary to shew at the trial that the attorney on the record has been appointed under seal ; but on this point see also *Hawkins Hill Gold Mining Co. v. Briscoe*, (1887) 8 N.S.W.R. Eq. 123 ; *Broken Hill Smelting Co. v. Foeman*, (1896) 13 W.N. 110.

Indorsement of debt and costs, and notice that proceedings will be stayed on payment

17 Vic. No. 21, s. 8.

10. Upon every writ sued out for the payment of any debt, and upon every copy of such writ, shall be indorsed—

- (a) the amount of the debt ; and
- (b) the amount the plaintiff's attorney claims for the costs of such writ, copy, and service, and attendance to receive debt and costs ; and
- (c) that upon payment thereof to the plaintiff or his attorney within the time limited for defendant's appearance further proceedings will be stayed.

Such endorsement shall be written or printed in Form No. 2 contained in the Second Schedule hereto, or to the like effect.

Notwithstanding such payment the defendant may have the costs taxed, and if more than one-sixth be disallowed the plaintiff's attorney shall pay the cost of taxation.

The amount of the debt.—The debt should not be overstated. If it is, the defendant may stay proceedings on payment of the sum really due, and the costs of the writ only : *Elliston v. Robinson*, 2 Dowl. 241. To do so he must take out a summons to stay. If the plaintiff refuse the amount offered, such refusal will be indorsed by the judge on the summons, and if after this he recover no more, he will have to pay the defendant's costs : *Watson v. Coleman*, 7 M. & G. 424 ; but the defendant must pay the amount offered into court : *Clerk v. Dann*, 3 Dowl. 513. The acceptor of a bill of exchange, or the maker of a promissory note, may stay proceedings on payment of debt and costs in that action only : R. 97 (*post*).

The object in requiring this indorsement is, that the defendant may stay the proceedings by paying the amount claimed. It does not limit the plaintiff except for that purpose : *Jacquot v. Bourra*, 5 M. & W. 156. The corresponding (English) section provided that proceedings were stayed on payment within four days ; and see here R. 94 (*post*).

The indorsement is to be made on the writ and copy for the payment of a debt properly so called ; consequently an indorsement is not necessary when the plaintiff claims damages, or damages and debt : *Perry v. Patchett*, 2 Dowl. 667. Nor is an indorsement required on the writ in an action on a bail bond or replevin bond : *Rowland v. Dakeyne*, 2 Dowl. 832 ; *Smart v. Lovett*, 3 Dowl. 34 ; nor in a *qui tam* action : *Hobbs v. Young*, 2 D. & L. 474.

Omission of indorsement.—The want of this indorsement is an irregularity : *Truslove v. Whitechurch*, 8 Dowl. 837 ; which may, however, be amended, at the plaintiff's cost, (s. 20 *post*).

As to special indorsements, see s. 24 (*post*).

The amount claimed for costs.—The old rules dealing with the amount to be indorsed for costs have not been re-enacted; see now 4th Schedule to Rules, *post*, "Costs in undefended actions." If defendant disputes the amount indorsed he should either pay and have the bill taxed under the latter part of the section: *Elliot v. Gough*, (1884) 1 W.N. 53; or proceed under R. 94 (*post*).

**C.L.P. Act,
S. 10.**

Costs were at one time assessed: *Borough of Ashfield v. Baldick*, (1895) 11 W.N. 162; but this practice was wrong: *Dowling v. Burt*, 14 W.N. 177.

The defendant may have the costs taxed, though he pay less than the sum indorsed: *Hunter v. Russell*, 5 M. & G. 601; but see *Young v. Crompton*, 2 D. & L. 557.

11. The plaintiff in any such personal action may at any time during six months from the issuing of the original writ of summons issue one or more concurrent writ or writs, each concurrent writ to bear teste of the same day as the original writ, and to be marked by the prothonotary with the word "concurrent" and the date of issuing the concurrent writ: Provided that such concurrent writ or writs shall only be in force for the period during which the original writ in such action is in force.

**Concurrent
writs.
17 Vic. No. 21,
s. 9.**

Months.—In all Acts of Parliament the word "month" is to be taken to mean calendar month, unless words be added showing lunar month to be intended (Interpretation Act of 1897, s. 21. (d)); and see R. 4 (b), (*post*). But in legal proceedings generally a month is four weeks: *Tullet v. Linfield*, 3 Burr. 1455; 1 W. Bl. 450; *Soper v. Curtis*, 2 Dowl. 237.

Six months.—As to the time, see now R. 30 (*post*).

As to how calendar months are to be reckoned, see *Freeman v. Read*, 4 B. & S. 174; 32 L.J.M.C. 226.

Writs for service out of the State may be issued under s. 7 of the (Commonwealth) Service and Execution of Process Act, 1901, concurrently with a writ for service within the State: see that Act (*post*). And also under this Act, s. 22 (*post*).

Concurrent writ.—A concurrent writ must be issued within six months (but see R. 30) from the first issuing of the original writ. A concurrent writ cannot be issued upon a renewed writ, after the expiration of six months from the issue of the original writ: *Coles v. Sherrard*, 11 Exch. 482.

The writs must correspond with each other, and the defendant will only be liable for the costs of the writ with which he is served: *Angus v. Coppard*, 3 M. & W. 57.

Provided that such concurrent writ or writs shall only be in force, etc.—

The concurrent writ will at first be only in force until the expiration of the six months of the currency of the original writ; but as the original writ may, by renewal, be continued in force from six months to six months, it would seem that if it be renewed, the concurrent writ will also continue in force by virtue of that renewal (see s. 12 *post*).

12. (1) No original writ of summons shall be in force for more than six months from the day of the date thereof including the day of such date.

**Currency of
writ and
renewal.
Ibid. s. 10.**

(2) If any defendant therein named has not been served therewith, the original or concurrent writ of summons may be renewed at any time before its expiration for six months from the date of such renewal, and so from time to time during the currency of the renewed writ, by being marked by the proper officer with the date of such renewal upon delivery to him by the plaintiff or his attorney of a præcipe in such form as before the commencement of the Common Law Procedure Act of 1853 was required to be delivered upon the obtaining of an alias writ.

(3) A writ of summons so renewed shall remain in force and be available to prevent the operation of any statute whereby the time for the commencement of the action may be limited and for all other purposes from the date of the issuing of the original writ of summons.

**C.L.P. Act,
8. 12.**

Six months.—But see R. 30, (*post*), under which writs for service in New South Wales are to be in force for three months; for service in any other State of the Commonwealth or in New Zealand or Fiji, four months; for service elsewhere six months.

Though the writ be served out of time the defendant may by his conduct waive the irregularity: *Hatten v. Ramsay*, (1886) 2 W.N. 49; see *Hemp v. Warren*, 2 Dowl. N. S. 758.

Renewal.—Where the last day for renewal fell on 29th December (a Sunday) and the writ was therefore taken to the proper office for renewal on the 28th December, when the office was found closed for the Christmas holidays, the Court refused to allow the writ to be renewed *nunc pro tunc*: *Evans v. Jones*, 2 B. & S. 45; S.C., *sub nom. Anon.*, 31 L.J., Q.B. 61. In *Anon.* 24 L.J., Q.B. 23, *Crompton, J.*, in the Bail Court, held, that when the last day of the six months, so reckoned as to include the day of the previous renewal, was a Sunday, the renewal should have been made on the previous day.

As to the effect of the offices being closed on the last day for taking any step in a cause, &c., *vide* R. 402 (*post*).

The Court of Queen's Bench after consultation with the judges of the other courts held, that they had no jurisdiction to allow a renewal *nunc pro tunc* where the omission to renew in due time was the omission of the plaintiff's attorney, and there had been no default on the part of the officer of the Court: *Naser v. Wade*, 1 B. & S. 728; 31 L.J., Q.B. 5.

A defendant who has been served after the expiration of the time limited should not treat the writ as a nullity, but should apply to set it aside: *Hemp v. Warren*, 2 Dowl. N.S. 758.

In order to renew the writ, a renewal *præcipe* must be made out. The writ will be resealed with a "renewal" seal, in the same way as when originally sealed on delivery of the *præcipe* to the officer (s. 4, *ante*).

The renewed writ will itself require renewal, if the defendant is not served within six calendar months from the date of renewal.

A writ of summons so renewed shall remain in force, etc.—It is now settled that the period during which the renewed writ continues in force is to be reckoned inclusive of the day of renewal: *Anonymous*, 1 H. & C. 664; 32 L.J., Ex. 88; *Fisher v. Cox*, 16 L.T., N.S. 397. In the former cases of *Black v. Green*, 15 C.B. 262; S.C., *sub nom. Anon.*, 24 L.J., C.P. 1, and *Anon.*, 24 L.J., Q.B. 23, where the officer had refused to renew the writs when presented to him for that purpose on the day following the expiration of the six months, the court ordered the writ to be stamped as of that day, without expressing any opinion as to the validity of the writ so renewed. But it has been held that where a judge, after the expiration of the time limited by this section, makes an *ex parte* order for the renewal of a writ *nunc pro tunc*, the plaintiff, in order to maintain the validity of such renewed writ, must prove to the Court that such order was rightly made: *Fisher v. Cox*, 16 L.T., N.S. 397.

Renewal of writs issued before this Act.
17 Vic. No. 21, s. 11.

13. Where any writ of summons in any such personal action has been issued before and is in force at the commencement of this Act such writ may at any time before the expiration thereof be renewed under the provisions of and in the manner directed by this Act, and shall after such renewal have the same duration and effect for all purposes, and shall if necessary be subsequently renewed in the same manner as if it had originally issued under the authority of this Act.

See *Gapp v. Robinson*, 12 C.B. 828; 22 L.J., C.P. 5.

Production of renewed writ evidence of commencement of action.
Ibid. s. 12.

14. The production of a writ of summons purporting to be marked as aforesaid by the proper officer, showing the same to have been renewed according to this Act, shall be evidence of its having been so renewed and of the commencement of the action as of the first date of such renewed writ for all purposes.

It may be inferred that "evidence" here means *prima facie* evidence, the defendant being at liberty to rebut the evidence afforded by this section: see *Barraclough v. Greenhough*, L.R. 2, Q.B. 612; and *Fisher v. Cox*, 16 L.T., N.S. 397.

15. The person serving the writ of summons shall within three days after such service indorse on the writ the day of the month and week of the service thereof, otherwise the plaintiff shall not be at liberty in case of non-appearance to proceed under this Act. **C.L.P. Act, s. 15.**

Indorsement
of service.
17 Vic. No. 21,
s. 13.

Every affidavit of service of such writ shall mention the day on which such indorsement was made.

Shall . . . indorse.—This indorsement may be signed by a marksman, but service should not be effected by a marksman: *Baker v. Coghlan*, 7 C.B. 131.

The affidavit may be sworn before a J.P. or a commissioner for taking affidavits. It cannot be made before the plaintiff's attorney or his clerk, nor before the attorney in the country if his agent in town is the attorney on the record: *In re Gray*, 21 L.J., Q.B. 380; R. 389, *post*. Any person may serve a writ: General Legal Procedure Act, 1902, s. 3, *post*.

Affidavit.—The affidavit should show that the writ and indorsements are regular: *Wakeley v. Teesdale*, 2 L.M. & P. 85; and a copy of the writ should be annexed.

A mere process server is not ordinarily liable in an action for negligence in not making this indorsement upon a writ served by him; although the plaintiff's attorney may be liable for such negligence, where the plaintiff has been damaged thereby: *Curler v. Broad*, 1 H. & C. 322; 31 L.J., Ex. 473.

16. Every writ of summons issued against a corporation aggregate may be served on the mayor or other head officer, or on the town clerk, treasurer, clerk, or secretary of such corporation. **Service on corporations. *Ibid.* s. 14.**

Corporation.—This section does not apply to a foreign corporation: *Ingate v. Austrian Lloyd's*, 4 C.B., N.S. 704; 27 L.J., C.P. 323.

But a foreign corporation, carrying on a branch business at an office in New South Wales, may be sued in the State, and service on the head officer of the branch business is good: see *Newby v. Van Oppen, & Co.* L.R. 7 Q.B. 293. The Company however, must be carrying on its business here in such a way as to be virtually resident here, and it is the duty of the Court in each particular case to decide whether this is so: *Wood v. Pacific Mail Co.*, (1878) 1 S.C.R., N.S. 91. In this case it was held by a majority of the Court that a shipping company trading between San Francisco and Sydney, with its head office in San Francisco, and represented in Sydney by a firm carrying on a separate business as merchants, was not resident in the State. But a foreign bank with a branch office carrying on a banking business in Sydney is resident in the State, and may be sued even on a contract made out of the State: *Great Cobar Copper Mining Co. v. Comptoir d'Escompte de Paris*, (1889) 10 N.S.W.R. 55; 5 W.N. 100. And see the late case of *Bowden Brothers & Co. v. Imperial Marine and Transport Insurance Company*, (1902) 19 W.N. 36, 177, where it was held that the defendant company, carrying on business in New South Wales so as to be resident here, could be sued on a contract made and broken abroad.

Where an English company had been carrying on business here, but had sold its business and ceased to carry on business here, service on its late manager was set aside: *Baker v. Walker Sons & Bartholomew, Ltd.*, (1901) 18 W.N. 282.

A foreign corporation not carrying on business in this State so as to be resident here, cannot be sued in our Courts even under a writ for service out of the jurisdiction (see notes to s. 18 *post*); but this would not now seem to apply to a corporation in another State of the Commonwealth, under the Commonwealth Service of Process Act (*post*); and in *Glanville v. J. B. Lippincott Co.*, (1900) 17 W.N. 74, it was held that service of a writ of summons against a foreign corporation cannot be effected by service on an agent of the corporation here: followed in *Bendall v. Oceanic S.N. Co.* (1900) 17 W.N. 157.

Head officer, etc.—The fact that the person served is the only officer of the company within the jurisdiction does not necessarily make him a "head officer" within the section. Where the only officer in England of a Scotch railway company was a booking clerk, it was held that he could not properly be served with a writ against the company: *Mackereth v. The Glasgow & S.W. Railway Co.*, (1873) L.R. 8 Ex. 149. Service on a Sydney firm representing a foreign shipping company has been held to be bad in a case where the company was sued on a judgment recovered in

C.L.P. Act, s. 16. *Fiji: Woods v. Pacific Mail Co. (supra).* But service on a mine manager at Broken Hill, the head office of the company being in Melbourne, has been held sufficient *Buck v. Eaglehawk Silver Mining Co., (1890) 6 W.N. 149.*

Secretary.—Under an English Act providing for service on the Secretary of a company, service on the secretary of the Caledonian Railway Co., which is partly in England and partly in Scotland, while he was attending a meeting in London, was held good: *Wilson v. Caledonian Railway Co., (1850) 5 Ex. 822.* But in a similar case, where the service was effected at the office of the company in Scotland, the service was set aside: *Thompson v. N. British Railway Co., 42 L.T. 95 (see Day, C.L.P. Act, 43).*

Clerk.—Where a statute provided that service of any writ or notice on the clerk, or by leaving the same at the head office of the company, or in case such clerk should not be found or known, then service on any agent or officer of the company, or by leaving the same at his abode, should be sufficient service on the company, it was held that the word *clerk* meant chief clerk, not a mere clerk employed under a secretary or other clerk: *Walton v. Universal Salvage Co., 16 M. & W. 438.*

A writ was served on B., the manager of the Sydney branch of a banking company, having its head office in London, after he had received telegrams instructing him to stop payment and informing him that a winding up order had been made and a liquidator appointed in England. The Court refused to set aside the writ, holding that the telegrams were not sufficient evidence that the bank had ceased to carry on business in the Colony under B's management: *Wilkins v. Oriental Bank, (1884) 5 N.S.W.R. 208.*

As to service on companies under the Companies Acts; see now the Companies Act, 1899, ss. 228, 229.

Proceedings where personal service cannot be effected.

17 Vic. No. 21, s. 15.

17. The service of the writ of summons shall, wherever it is practicable, be personal, but where reasonable efforts have been made without success to effect personal service, a true copy of the writ may be left at the defendant's then usual place of abode with some competent person there then residing, to be named or otherwise sufficiently described in the affidavit of service herein-after mentioned.

English section.—It should be noted that the corresponding section, under which the English cases have been decided (C.L.P. Act, 1852, s. 17), differed considerably from this. Instead of allowing substituted service, it provided that the plaintiff might obtain leave to proceed "as if personal service had been effected" upon satisfying a judge by affidavit that reasonable efforts had been made to effect personal service, and either that the writ had come to the knowledge of the defendant, or that he wilfully evaded service of the same, and had not appeared thereto.

Writs may be issued or served in vacation: R. 10 (c), *post*.

Personal service is effected by leaving a true copy of the writ with the defendant personally; and it is not necessary to show the original to the defendant unless he asks to see it: see Chitty's Archbold, 199, on this subject.

The service should be made by some one who knows the defendant and can swear to his identity. A writ should not be served on a defendant when he is attending a court of justice: *Cole v. Hawkins, 2 Stra. 1094*; but where a writ is so served the service will not be set aside for irregularity, *feri non debet, factum valet*: *Poole v. Gould, 1 H. & N. 99.* Where a husband and wife are sued together, service on the husband is sufficient: *Buncombe v. Love, Barnes, 406.* It was formerly held that *personal* service was absolutely necessary in the case of a lunatic, as he could not know of the writ and evade its service: *Williamson v. Moggs, 28 L.J. Ex. 5*; *Holmes v. Service, 15 C.B. 293*; *24 L.J., C.P. 24*; and *Ridgway v. Cannon, 23 L.J. Q.B. 143*; *2 W.R. 473*; formerly a *distringas* was necessary: *Blake v. Cooper, 11 C.B. 680*, but it has since been decided by the Court of Exchequer that an action may proceed against a lunatic on the writ of summons coming to his knowledge: *Kimberley v. Allen, 8 L.T., N.S. 398*, in the same way as against any other person (*per Bramwell, B., Ibid.*).

Where the governor of a prison refused to allow service of a writ upon a defendant in the prison, the Court granted a rule to show cause why an attachment should not issue against him; whereupon service was permitted: *Danson v. Le Capelain, 21 L.J. Ex. 219*; and this course was followed in *Denison v. Harding, 15 W.R. 346*, where the defendant was confined in a lunatic asylum. Another method of procedure in such a case is to apply for a habeas to bring up the defendant to be served: *Ridgway*

v. Cannon (supra); but see the remarks of the court, on this course, in *Denison v. Harding (supra)*. As to service on Commissioners of Admiralty, see *Williams v. Commissioners for executing the Office of Lord High Admiral*, 11 C.B. 420. **C.L.P. Act, S. 17.**

Service on attorney.—The defendant's attorney may accept service on his behalf, and such a service is equivalent to personal service.

An undertaking by an attorney to appear will be enforced by attachment: *R. 37, post*; *Jacob v. Magnay*, 12 L.J., Q.B. 93; *Morris v. James*, 6 Dowl. 514; *Squires v. Weekes*, (1893) 9 W.N. 122; *Darley v. Hyman*, (1894) 15 N.S.W.R. 189; 10 W.N. 212.

Reasonable efforts.—The efforts that will be considered *reasonable* are generally such as were considered *necessary* before applying for a *distingas*; they must be reasonable according to the actual facts and not merely according to the plaintiff's knowledge of them: *Flower v. Allen*, 2 H. & C. 688; 33 L.J. Ex. 83. In England, where an order had been made allowing the plaintiff to proceed without personal service, the defendant was entitled to have it set aside on *showing* that he had been without the jurisdiction ever since the issuing of the writ: *Hesketh v. Fleming*, 24 L.J. Q.B. 255; *Flower v. Allen (supra)*. The plaintiff should make three separate applications: *Gale v. Winkes*, 2 N.C. 294; although two calls have been considered sufficient in some cases [*per Erskine, J.*, *Mills v. Boulton*, 1 Dowl. N.S. 707] at the defendant's residence: *Croft v. Brown*, 7 Q.B. 284; *Russell v. Knowles*, 2 D. & L. 595; on different days: *Cross v. Wilkins*, 4 Dowl. 297; unless an appointment is made by or on behalf of the defendant for a second call on the same day: *Jamieson v. Wilkins*, 2 Dowl. N.S. 331; in the case of *Goviller v. Fauntleroy*, 2 W.N. (Eng.), 1867, p. 37. H.T., the Court of Common Pleas held, that it was necessary to prove that three calls had been made and two appointments, and that a copy of the writ had been left. The calls must be at the residence of the defendant: *Rock v. Adam*, 15 L.J., C.P. 192, unless he has no fixed residence, or has left and cannot be found: *Greenwood v. Selden*, 9 Dowl. 72, in which case it must be shown that he is not abroad: *Norman v. White*, 4 N.C. 636. The calls may be made at the defendant's place of business if his residence be unknown: *Baker v. Coe*, 1 Exch. 153; but it has been held that where they are not made at the defendant's residence, it must appear from the affidavit that his place of residence is unknown, and that reasonable efforts have been made to ascertain it: *Anon.*, 2 D. & L. 1001; *Davies v. Westmacott*, 7 C.B., N.S. 829; 29 L.J. C.P. 150; even where a copy of the writ had been left at the defendant's club house and is shown to have come to his hands (*Ibid.*), and see *Newton v. Webster*, (1866) 6 S.C.R. 12 (*infra*). In a more recent case, however, the same court seemed inclined somewhat to relax this rule as to calls at the defendant's residence, where he had a separate place of business: *Tomlinson v. Goatly*, L.R. 1 C.P. 230. The nature of the business ought to be mentioned, and notice given of the intended future call, and the day and hour mentioned, or an appointment made with the defendant: *Johnson v. Rouse*, 1 Dowl. 641; *Cross v. Wilkins (ante)*; *Newman v. Hickman*, 9 Dowl. 546. On the last call a copy of the writ should be left for the defendant: *Hill v. Maule*, 2 Dowl. 10.

These particulars were required in England to be mentioned in the affidavit on which the application to dispense with service was made and it was also necessary to state that the writ of summons had been regularly issued and indorsed: *Wakeley v. Teesdale*, 2 L.M. & P. 85. The inquiries made by the party endeavouring to serve the writ had also to be stated in the affidavit: *Dubois v. Louther*, 4 C.B. 228; also the answers made to the inquiries: *Fisher v. Goodwin*, 2 C. & J. 94; that the court might judge whether the defendant was in truth avoiding service. The same particulars should be given here in the affidavit of service, to show that the substituted service was justifiable.

Substituted service.—Substituted service is invalid unless reasonable efforts to effect personal service have been previously made in compliance with the section, even though it is clear that the writ has come to the defendant's hands in due time: *Newton v. Webster*, (1866) 6 S.C.R. 12; where the summons was left in an envelope at defendant's club; and see *Hudson Bros. v. Wilkinson & others*, (1890) 6 W.N. 114. Where the affidavit of service wrongly states it to have been personal, the proceedings will be set aside, though service might have been good under the latter part of the section: *Hudson Bros. v. Wilkinson (supra)*; *Sewell v. Sinclair*, (1884) 1 W.N. 32.

Statutory service.—In the case of public companies, commissioners, and other bodies created by statute, the statute usually prescribes the mode of service, which must be strictly followed. With respect to corporations, see s. 16 (*ante*).

Renewed and concurrent writs.—The above observations as to the service of the writ of summons apply, of course, to a renewed or concurrent writ.

**C.L.P. Act,
S. 17.**

Irregularity of service.—If the service of the writ is irregular, it may be set aside. If the irregularity is apparent from the copy served, as, for example, if there is no indorsement of the amount of costs claimed by the plaintiff, the defendant may apply either to the court or to a judge at chambers to set it aside; and the application should be to set aside the service: *Truslove v. Whitechurch*, 8 Dowl. 837; *Hall v. Redington*, 5 M. & W. 603; see also *Wills v. Dawson*, 2 Dowl. N.S. 465; *Hemp v. Warren*, 2 Dowl. N.S. 758; see *Sevil v. Heath*, (1877) Knox 359 (*ante*) s. 7, notes; *McLean v. C. Y. Lee*, (1885) 2 W.N. 51; *Hudson Bros. v. Wilkinson & others (supra)*; and *Sewell v. Sinclair*, 1 W.N. 32 (*ante*). As to applications to set aside, see s. 20 (*post*), and R. 309 (*post*).

Waiver of irregularity.—An objection to the service of a writ may be waived by lapse of time: *Holmes v. Russell*, 9 Dowl. 487; *Davis v. Sherlock*, 7 Dowl. 530; by taking a step in the cause: *Homfray v. Kenning*, 2 Chit. 236, R. 309 (*post*); by asking for time to pay: *Rawes v. Knight*, 1 Bing. 132; or by promising to settle: *Lloyd v. Hawkyard*, 1 M. & R. 32; or by expressing regret at not having paid: *Holt v. Ede*, 1 D. & L. 68.

Notice not to appear.—If the plaintiff discovers an irregularity in the writ, copy or service, he may give the defendant notice not to appear, which will prevent the defendant, if he have had notice in time, from incurring further costs. If he has incurred costs, as, for instance, by obtaining a rule or summons to set aside the proceedings, such costs should be tendered.

See also as to reasonable time within which to apply, and also as to application of the R. 309 (*post*): *Bayne v. Slack*, 3 C.B., N.S. 363; 27 L.J., C.P. 14.

Actions against
British subjects
residing out of
the jurisdiction.
17 Vic. No. 21,
s. 10.

18. (1) In case any defendant being a British subject is residing out of the jurisdiction of the Court, the plaintiff may issue a writ of summons in the Form No. 3 contained in the Second Schedule hereto, which writ shall bear the indorsement contained in the said form purporting that such writ is for service out of the jurisdiction.

(2) The time for appearance by the defendant to such writ shall be regulated by the distance from Sydney of the place where the defendant is residing.

(3) The Court or a Judge, upon being satisfied by affidavit—

(a) that there is a cause of action which arose within the jurisdiction, or in respect of the breach of a contract made within the jurisdiction; and

(b) that the writ was personally served upon the defendant or that reasonable efforts were made to effect personal service thereof upon the defendant, and that it came to his knowledge; and

(c) either that the defendant wilfully neglects to appear to such writ, or that he is living out of the jurisdiction in order to defeat and delay his creditors,

may from time to time direct that the plaintiff shall be at liberty to proceed in the action in such manner and subject to such conditions as to the Court or Judge seem fit, having regard to the time allowed for the defendant to appear being reasonable, and to the other circumstances of the case:

Provided always that the plaintiff shall prove the amount of the debt or damages claimed by him in such action, either before a jury upon a writ of inquiry or before the prothonotary of the Court in the manner hereinafter provided according to the nature of the case as the Court or Judge may direct, and the making such proof shall be a condition precedent to his obtaining judgment.

Provision for service of writs, etc., within other States of the Commonwealth is now made by the Commonwealth Service and Execution of Process Act, 1901: see the Act (*post*). **C.L.P. Act, S. 18.**

British subject.—This section does not apply to foreign corporations: *Ingate v. Austrian Lloyds*, 4 C.B., N.S. 704; 27 L.J., C.P. 323; even though in other British possessions: *Peele v. Australian Fruit Preserving Co.*, (1885) 2 W.N. 10; *Ellis v. Lyttleton Harbour Board*, (1885) *Ibid.*, 45; *Connell v. Neil & Co.*, (1890) 7 W.N. 6. But now a corporation in another State of the Commonwealth could apparently be served under the Commonwealth Service and Execution of Process Act, (1901), *post*.

Residing out of the jurisdiction.—Where the defendant, though his residence is out of the jurisdiction, happens to be within the jurisdiction, the plaintiff may serve him with an ordinary writ under s. 4 (*ante*). A writ indorsed for appearance within eight days having been served on the defendant in Sydney, an application by him to set aside the writ on the ground that he was a resident of New Zealand and could only be proceeded against under this section, was dismissed with costs: *Davis v. Harley*, (1884) 5 N.S.W.R. 213.

May issue a writ in Form No. 3.—The provisions as to the issue, service and indorsement under s. 10 of ordinary writs apply to this writ, but not the provisions as to special indorsement: *North v. Shierlaw*, (1897) 13 W.N. 163. There is a special provision (s. 23, *post*) enabling consuls to take affidavits of service.

As the original writ must be shown to a defendant when served, if required by him, the original writ should, in the case of service out of the jurisdiction, be sent to the person charged with the service.

As to indorsement of service, see s. 15 (*ante*). The use of the wrong Form may be amended, s. 21.

The time for appearance.—The time allowed for appearance is now fixed by R. 34 (*post*). Under the English practice it was left to the plaintiff to judge for himself what would be a reasonable time.

Affidavit.—The affidavit need not necessarily be made by the plaintiff. It may be made by one of several plaintiffs: *Swayne v. Crammond*, 4 T.R. 176. It may be made by another person, who can swear to the cause of action, the existence of which should not only be shown according to his knowledge, but the means of that knowledge should appear, that the Court or Judge may see whether the deponent has sufficient means of knowledge.

The insufficiency of the affidavit may be waived by the defendant: *Harrison v. Williams*, 24 L.T. 149.

Cause of Action.—It may be useful to refer to a few of the cases illustrative of what have been held *sufficient* and what *insufficient* statements of "*causes of action*,"—cases generally decided on applications to hold defendant to bail; but the principles laid down in these cases may be considered generally applicable to an affidavit necessary for obtaining leave to proceed on a defendant's absence and non-appearance. The plaintiff must show a distinct cause of action in law, that is to say, one which, if alleged in a declaration, would not be open to demurrer: *Siemann v. Cooke*, (1887) 4 W.N. 72; and see other cases on *ca re.*, Arrest on Mesne Process Act, (1902), *post*.

In a case where the defendant was stated to be indebted to the deponent, under a *deed* by which the defendant covenanted to pay money at a time *now past*: *Lambert v. Wray*, 3 Dowl. 1691; and in another, where the defendant was said to be indebted to the plaintiff in £500 "upon a certain *indenture of mortgage*, by which the defendant covenanted to pay the said sum of money to the plaintiff at a certain day now past": *Masters v. Billing*, 3 Dowl. 751; the affidavits were held sufficient.

An affidavit on a bond should state the bond to be due and payable: *Smith v. Kendal*, 7 D. & R. 232. In a case where the affidavit stated the debt to "be for *principal and interest due on a bond*," without stating the bond to be conditioned for the payment of money: *Byland v. King*, 7 Taunt. 275, it was held sufficient.

An affidavit of debt on an *award* should state the submission, the making of the award, and that the money was due at a day past: *Anon.* 1 Dowl. 5. If the award direct the money to be paid by defendant to plaintiff on demand, such demand should be stated: *Driever v. Hood*, 7 B. & C. 494. An affidavit that the defendant was indebted for damages awarded, and for costs and expenses taxed and allowed, has been held sufficient: *Jenkins v. Law*, 1 B. & P. 365.

Bills and notes.—Where the debt arises on bills or promissory notes, these should be stated to be due and unpaid: *Kirk v. Almond*, 1 Dowl. 318. If a note is payable by instalments, the affidavit should show what instalments are due and unpaid:

C.L.P. Act, s. 18. *Hart v. M'Gerris*, 3 Tyr. 238. An affidavit, stating the defendant to be indebted in a certain sum, as the balance of a bill drawn by plaintiff and accepted by the defendant, and due at a day past, has been held sufficient: *Walmsley v. Dibden*, 4 Moo. & P. 10.

It should also appear how the defendant is liable, whether as acceptor, drawer or indorser: *Humphreys v. Winslow*, 6 Taunt. 531. The affidavit should show the character in which the plaintiff claims, whether as indorsee or payee; and if as indorsee, it should state by whom the bill was indorsed: *Lewis v. Gompertz*, 1 Dowl. 319.

Intermediate indorsements need not be stated when the maker of a promissory note is sued by an indorsee of the payee: *Luce v. Irvin*, 6 Dowl. 92; in actions against the drawer of a bill, the affidavits should allege the presentment to, and the default of the acceptor, or facts to dispense with these allegations; but it need not allege notice of dishonour: *Simpson v. Dick*, 3 Dowl. 731.

Goods sold, &c.—Affidavits of debt for "goods sold," not stating delivery, and for "goods sold and delivered," not stating "by the plaintiff to defendant": *Young v. Gatten*, 2 M. & S. 603; *Handley v. Franchi*, L.R. 2 Ex. 34; *Whyte v. Cargill*, (1863) 2 S.C.R. 171; for goods sold and delivered to the defendant without saying "by the plaintiff": *Carthrow v. Hagger*, 1 East. 106; and for goods sold and delivered for the defendant, instead of to the defendant: *Bell v. Thrupp*, 2 B. & A. 596; for work done and materials provided, and goods manufactured and made by the deponent for the defendant at his request: *Pontifex v. Maltzoff*, 1 Exch. 436, have been held bad.

Money lent, &c.—An affidavit of debt for money paid, laid out, and expended, and lent and advanced, by plaintiff "to" the defendant, and at his request, omitting the words "for the defendant," has been held insufficient: *Frick v. Poole*, 9 B. & C. 543. An affidavit for money had and received on account of the plaintiff ought to state it to have been received by the defendant to the plaintiff's use: *Kelly v. Curson*. 4 Ad. & E. 622.

Account stated.—An affidavit that defendant is indebted to plaintiff in £1,000, under an agreement in writing, whereby defendant undertook to pay plaintiff the balance of accounts, &c. "which said balance is still due and unpaid," without stating that the balance was £1,000, was held insufficient: *Hatfield v. Lingard*, 6 T.R. 217. So also where the words were "for money found to be due from the said defendant to me, on the balance of an account current, from 18th February, 1856, to 20th August instant": *Prince v. Kennedy*, (1863) 2 S.C.R. 174. But an affidavit that defendant is indebted to plaintiff on the "balance of an account stated," without adding "and settled": *Tyler v. Campbell*, 3 N.C. 675; and an affidavit stating defendant to be indebted to plaintiff "on an account stated between them," have been held sufficient: *Balmanno v. May*, 6 Dowl. 306.

Guarantee.—An affidavit against the surety, on a guarantee for goods should show the amount guaranteed, the terms of the guarantee, that the time for payment had elapsed, and that the principal debtor had not paid: *Angus v. Robilliard*, 2 Dowl. 90.

Breach of agreement.—An affidavit of a cause of action arising on the breach of an agreement must state a breach of the agreement: *Stinton v. Hughes*, 6 T.R. 13. An affidavit that "defendant is indebted to me for services rendered to him and accounts paid for him as his manager upon a recent athletic tour in Brisbane and Newcastle" is insufficient for want of the addition "at the request of the defendant": *Siemann v. Cooke*, (1887) 4 W.N. 72.

Interest.—If interest be sought to be recovered as a debt, the affidavit should show an express contract: *Harrison v. Turner*, 4 Dowl. 72. It need not state the amount of the principal, nor the time when it began to run: *White v. Sowerby*, 3 Dowl. 584.

Which arose within the jurisdiction, etc.—The English decisions on the meaning of the expression "cause of action which arose within the jurisdiction" were for a time very conflicting. In the Court of Queen's Bench it was held, in the case of contracts, that both the making of the contract and the breach must have taken place within the jurisdiction: *Alhusen v. Malgarejo*, L.R. 3 Q.B. 340; *Cherry v. Thompson*, L.R. 7 Q.B. 573. The Courts of Common Pleas and Exchequer, on the other hand, adopted the construction that the section applied to a breach within the jurisdiction of a contract made anywhere between the plaintiff and defendant. Thus, where the contract was made in the Isle of Man, and the breach took place in England, the Court of Common Pleas held that the section applied, that "the cause of action" meant the act on the part of the defendant which gave the plaintiff his cause of complaint: *Jackson v. Spittall*, L.R. 5 C.P. 542. In a later case it was announced that

the judges of the Court of Queen's Bench, though still remaining of the same opinion as before, had, for the sake of conformity, agreed to be bound by the opinion of the majority, and that consequently in future all the Courts would act upon the decision in *Jackson v. Spittall*; *Vaughan v. Weldon*, L.R. 10 C.P. 47.

**C.L.P. Act,
s. 18.**

The plaintiffs sued for commission on the sale of a station in New South Wales. The sale was effected in Sydney. The employment of the plaintiffs was partly by letters between the defendants in Melbourne and the plaintiffs in Sydney, and partly by communications between the plaintiffs and the Sydney agent of the defendants. It was held that the cause of action arose within the jurisdiction: *Johnson v. Poole*, (1877) Knox 394.

Plaintiff advertised for tenders for the supply of machinery, and the defendants sent to plaintiff's Melbourne agents a tender, which the agent forwarded to plaintiff in Sydney. Plaintiff accepted the tender by a telegram to his agent, who communicated the acceptance to defendants. The contract was to put the machinery free on board in Melbourne. After arrival in Sydney it was found to be defective. It was held that plaintiff could proceed under this section: *Gilles v. Langlands Foundry Co.*, (1885) 1 W.N. 127; see also *See v. Wallace*, (1890) 7 W.N. 3; *Menzies v. Williams*, (1893) 10 W.N. 13; and *Lasarus v. Thompson*, (1881) Tarleton's Term Reports (2nd term), 13; and notes to s. 188 (*post*). Section 9 of the Supreme Court Procedure Act, 1900 (*post*), does not apply to cases under this section; and *cf.* the Commonwealth Service and Execution of Process Act, 1901, s. 11.

Was personally served, etc.—As to what will be considered reasonable efforts to effect personal service: see notes to s. 17 (*ante*).

It must be distinctly shown that the writ came to the knowledge of the defendant: *Kitchen v. Wilson*, 4 C.B., N.S. 483. The proof in each case depends on its own particular facts. The following cases on s. 17 of the English Act may be consulted, but it must be borne in mind that the wording of the sections is different: *Thomas v. Pearce*, 4 D. & L. 317; *Goggs v. Lord Huntingtower*, 1 D. & L. 599; *Heath v. White*, 2 D. & L. 40; *Christmas v. Ficke*, 6 D. & L. 156; *Russell v. Lowe*, 2 Dowl. N.S. 233; *Davies v. Westmacott*, 7 C.B., N.S. 829; 29 L.J. C.P. 150. Where it can clearly be shown that the defendant is aware of the writ, and merely avoids service, the strict requirements as to the efforts to be made to effect service are not generally insisted on: *Wilkins v. Jones*, 3 D. & L. 747; and see *Gorringe v. Terrewest*, 2 L.M. & P. 12; 20 L.J. Q.B. 209, in which case the defendant had corresponded with the plaintiff's attorney as to a compromise of the action; see also *Barringer v. Handley*, 12 C.B. 720.

Wilfully neglects to appear.—The defendant's "wilful neglect to appear" will be presumed after the writ has come to his knowledge. The fact of no appearance having been entered may be stated in the same affidavit as the attempts to effect service, or in a separate affidavit. The search must be made before any application for leave to proceed as if service had been effected. It should appear to have been recent: *Hooker v. Townsend*, 1 Hodges, 204; and, if possible, on the day on which the application for leave to proceed is made: *Spence v. Barker*, 8 Dowl. 296. A search four days old has been considered stale: *Drinkwater v. Mill*, 12 C.B. 452.

Living out of jurisdiction.—The alternative "living out of the jurisdiction to defeat and delay creditors," is a presumption to be raised from the particular facts of each case. It is not a fact to be drily stated, but in an affidavit circumstances sufficient to raise the presumption must be set out; see hereon decisions under s. 4 (d) of the Bankruptcy Act 1898.

The plaintiff shall be at liberty to proceed.—The court or judge will order that the plaintiff be at liberty to proceed, and his proceedings are regulated by s. 26 (*post*), and s. 129 (*post*).

Where the plaintiff, after trying for two years, succeeded in serving the defendant personally with a writ in Paris under this section, the court held, that the plaintiff must make reasonable efforts to serve the declaration: *Thelwall v. Yelverton*, 10 Jur., N.S. 295.

In a case where it was shown that the defendant, who had been served with process in California under this section, and who remained there, was fraudulently making away with his property, the Court of Common Pleas (*dubitante Willes, J.*) ordered that he should plead to the declaration within eight days of its being filed at the Master's office: *Bates v. Bates*, 9 C.B., N.S. 561; 30 L.J. C.P. 191. And the court subsequently refused to stay the proceedings upon an appearance entered by the general attorney of the defendant after the expiration of the eight days above limited (S.C., 9 C.B., N.S. 564). See also *North v. Shierlaw*, (1897) 13 W.N. 163, where *Stephen, J.*, held that a declaration must be filed: ss. 24, 25 not applying to writs for service outside the jurisdiction.

C.L.P. Act,
S. 19.

Actions against
foreigners residing out of the
jurisdiction.

17 Vic. No. 21,
s. 17.

19. (1) In any action against a person residing out of the jurisdiction of the Court and not being a British subject, the like proceedings may be taken as against a British subject resident out of the jurisdiction, save that in lieu of the Form No. 3 in the Second Schedule, the plaintiff shall issue a writ of summons according to the Form No. 4 contained in the said Schedule, and shall in manner aforesaid serve a notice of such last-mentioned writ upon the defendant therein mentioned, which notice shall be in the form contained in the said Form No. 4.

(2) Such service shall be of the same force and effect as the service of the writ of summons in any action against a British subject resident abroad, and by leave of the Court or a Judge, upon their or his being satisfied by affidavit as aforesaid, the like proceedings may be had and taken thereupon.

The like proceedings.—The procedure under this section is precisely the same as that under s. 18 (*ante*), only that the affidavit of service should specify the service of the "notice" instead of the "copy" of the writ.

Form No. 4: the use of the wrong form may be amended: s. 21.

Notice.—Where the notice gave the defendant, a foreigner, a less time than the time limited for appearance in which to pay the debt and costs, the Court of Common Pleas refused to give the plaintiff leave to proceed, although the defendant had by letter admitted the debt: *Galli v. Mongruel*, L.R. 1 C.P. 46.

Affidavit.—See s. 18 and notes.

In an action against a foreigner resident abroad, where leave had been given by a judge to proceed against him as if personal service had been effected, upon an affidavit of a cause of action for work and labour arising in this country, the plaintiff upon a rule obtained by the defendant to show cause why that order should not be rescinded, made an affidavit that orders were given in this country by certain persons who were afterwards recognised by the defendant, in certain conversations abroad, as his agents; and it was thereupon held that, although this was denied by the defendant, there was sufficient evidence to satisfy a judge of a cause of action within the jurisdiction, and the defendant's rule was accordingly discharged: *Glover v. Persigny*, 11 W.R. 146.

As to indorsing the time of service, as in the case of an ordinary writ of summons, see s. 15 (*ante*).

This section does not apply to foreign corporations: *Ingate v. Austrian Lloyd's C.B.*, N.S. 704; 27 L.J., C.P. 323.

Amendment in
case of omission.
Ibid. s. 18.

20. If the plaintiff or his attorney omits to insert in or indorse on any writ of summons or copy thereof any of the matters required by this Act to be inserted therein or indorsed thereon, such writ or copy thereof shall not on that account be held void, but it may be set aside as irregular or amended upon application to be made to the Court or to a Judge; and such amendment may be made upon any application to set aside the writ upon such terms as to the Court or Judge seem fit.

Amendment.—A more general power of amendment is conferred by s. 260 (*post*); but the cases are collected here for convenience.

Amendment to save the Statute of Limitations.—The rule upon which the courts formerly acted in the amendment of the writ is laid down in *Goodchild v. Leadham*, 1 Exch. 707. They amended where the action would otherwise be barred by the Statute of Limitations, or where the writ itself varied from the *præcipe*. In *Brown v. Fullerton*, 13 M. & W. 556, a plaintiff was added; and in *Christie v. Bell*, 16 M. & W. 669, the character of the plaintiffs and defendants was added, in both cases, to save the statute. See also *Carne v. Malins*, 6 Exch. 803. In *Kirk v. Dolby*, 6 M. & W. 636, the date of the writ was altered to make it correspond with the *præcipe*, see also *Williams v. Williams*, 10 M. & W. 476; *Mavor v. Spalding*, 1 D. & L. 878; *Culverwell v. Nugee*, 15 M. & W. 559; but the date will not be altered to save the

statute, as the writ must bear the true date of its issue: *Campbell v. Smart*, 5 C.B. 196; *Bailey v. Owen*, 9 W.R. 128, *cor. Crompton, J.*; *Clarke v. Smith*, 2 H. & N. 753. In *Cornish v. Hocking*, 1 E. & B. 602; 22 L.J. Q.B. 142, the court allowed under s. 260 (*post*), the amendment of the indorsement on a *pluries* writ of summons issued before the Act came into force, by altering the date of the first writ, therein appearing, to its true date, in order to save the statute, but refused to amend the indorsement on the copy served on the defendant. In one case, before the Uniformity of Process Act (2 & 3 Will. 4, c. 39), a *capias* was amended by altering the name of the defendant: *Carr v. Shaw*, 7 T.R. 299; and in another case the christian names of two defendants were inserted: *Rutherford v. Mein*, 2 Smith, 392.

**C.L.P. Act,
S. 20.**

The courts formerly decided that they would not allow an amendment by the addition of a defendant: *Goodchild v. Leadham*, 1 Ex. 707; *Roberts v. Bate*, 6 Ad. & E. 778. Nor does this section enable them to do so, though the name of a defendant may be added after a plea in abatement: s. 42 (*post*).

Amendment of copy.—The courts formerly refused to amend the copy of the writ, for this is the act of the party: *Eccles v. Cole*, 8 M. & W. 537; *Cornish v. Hocking*, 1 E. & B. 602; 22 L.J. Q.B. 142. The power of amending the copy of the writ is here expressly given. Misnomers were formerly amended by judge's order, "at the cost of the plaintiffs": *Rush v. Kennedy*, 7 Dowl. 199. The court or a judge may amend now "upon such terms as may seem fit"; see s. 260 (*post*); *Ye Sing v. Lion Insurance Co.*, (1884) 1 W.N. 61; and *Fink v. Oliver*, (1885) 1 W.N. 108.

Where a writ gave defendant only eight days to appear, when it should have given him sixteen, an application by the defendant to enlarge the time for appearance was granted by the Chamber judge, but the order was set aside on appeal: *A.J.S. Bank v. Forrester*, (1871) 10 S.C.R. 143.

Application to set aside the writ.—The application to set aside the writ ought to be made within a reasonable time, ordinarily within the time allowed for appearing: *Tilling v. Hodgson*, 13 M. & W. 638; and it must be made before taking a fresh step, after knowledge of the irregularity: *R. 309* (*post*), and see *Sevil v. Heath*, (1877) Knox 359.

As to what will constitute irregularity in the writ, see ss. 4, 6, 7, 8, 9, 10, and cases noted thereon (*ante*).

21. If either of the Forms of writ of summons Nos. 1, 3, and 4, contained in the Second Schedule hereto, is by mistake or inadvertence substituted for any other of them, such mistake or inadvertence shall not be an objection to the writ or any other proceeding in such action; but the writ may, upon an *ex parte* application to a Judge whether before or after any application to set aside such writ, or any proceeding thereon, and whether the same or notice thereof has been served or not, be amended by such Judge with or without costs.

Amendment in case wrong form of writ used.
17 Vic. No. 21, s. 19.

Shall not be an objection, etc.—See *Green v. Braddyll*, (1856) 1 H. & N. 69, 4 W.R. 487, where in November, 1852, the plaintiff's attorney issued against the defendant a writ of summons in the form prescribed by the 18th section of the C.L.P. Act, 1852 (which is the same as the 18th section of this Act), for service on a British subject residing out of the jurisdiction. In the following March the defendant's attorney entered an appearance. The plaintiff's attorney not being aware that an appearance was entered, from time to time renewed the writ, and on the 31st March served the defendant, who had always resided in England, with a copy of the renewed writ. *Held*, that there was no ground for setting aside the proceedings.

22. A writ for service within the jurisdiction of the Court may be issued and marked as a concurrent writ with one for service out of the jurisdiction, and a writ for service out of the jurisdiction may be issued and marked as a concurrent writ with one for service within the jurisdiction.

Writs for service within and without jurisdiction may be concurrent.
Ibid. s. 20.

See s. 11 (*ante*), and the Commonwealth Service of Process and Execution Act, 1901, (*post*).

C.L.P. Act.
S. 23.

Affidavits in
certain cases
may be sworn
before a consul
17 Vic. No. 21,
s. 21.

23. (1) Any affidavit for the purpose of enabling the Court or a Judge to direct proceedings to be taken against a defendant residing out of the jurisdiction of the Court may be sworn before any consul general, consul, vice-consul, or consular agent for the time being appointed by Her Majesty at any foreign port or place.

(2) Every affidavit so sworn by virtue of this Act may be used, and shall be admitted in evidence, saving all just exceptions, provided it purport to be signed by such consul general, consul, vice-consul, or consular agent, upon proof of the official character and signature of the person appearing to have signed the same.

Upon proof.—Mr. Commissioner Heydon suggests in his note prefacing the Consolidating Bill that “upon” is a mistake for “without”; but the corresponding English s. 23 of the C.L.P. Act, 1852, uses the word “upon.”

Special indorse-
ment.
Ibid. s. 22.

24. (1) Where the defendant resides within the jurisdiction of the Court, and the claim is for a debt or liquidated demand in money with or without interest arising upon a contract express or implied, as for instance—

- (a) on a bill of exchange, promissory note or cheque, or other simple contract debt; or
- (b) on a bond or contract under seal for payment of a liquidated amount of money; or
- (c) on a statute, where the sum sought to be recovered is a fixed sum of money or in the nature of a debt; or
- (d) on a guarantee, whether under seal or not, where the claim against the principal is in respect of such debt or liquidated demand, bill, cheque, or note,

the plaintiff may make upon the writ of summons and copy thereof a special indorsement of the particulars of his claim in the Form No. 5 contained in the Second Schedule hereto, or to the like effect.

Special indorse-
ment to stand
for particulars
of demand.

(2) Such special indorsement shall be considered as particulars of demand, and no further or other particulars of demand need be delivered unless ordered by the Court or a Judge.

Special indorsement.—A judgment debt may be indorsed under this section: *Hodsoll v. Baxter*, E. B. & E. 884; 28 L.J. Q.B. 61.

Interest.—Interest must not be indorsed, unless payable under an express contract to that effect, or upon bills of exchange or promissory notes; and any attempt thus to obtain interest in other cases will be severely dealt with by the courts: *Rodway v. Lucas*, 10 Exch. 667.

But where interest was claimed on the special indorsement, and the defendant did not appear and plaintiff signed judgment, defendant applied to set aside the judgment on affidavits that there was no contract, express or implied, to pay interest, and, therefore, the writ was improperly specially indorsed. It was argued for the plaintiff that defendant should have appeared, and that as judgment had been signed for the amount claimed without any interest the judgment could not be set aside citing *Rodway v. Lucas* (*supra*); *Pring J.*, refused to set aside the judgment: *Parke & Lacey Co. v. King Conrad Silver Mining Co.*, (1902) 19 W.N. 253.

Plaintiff had specially indorsed a writ and included a claim for interest, and defendant appeared; plaintiff filed a declaration not claiming interest as flowing from the contract, and defendant pleaded but did not verify his plea under the rule (now R. 62, *post*); on summons to strike out the plea, *Owen, J.*, held that the writ was not properly specially indorsed: *Schneider v. Scherf* (No. 1), (1902) 19 W.N. 59

In an action on a policy of fire insurance the writ was specially indorsed and the special indorsement included a claim for interest. Defendant did not verify his plea, and plaintiff under the then rule signed judgment; *Cohen, J.*, set aside the judgment, holding that the writ was improperly specially indorsed for interest: *Lewington v. Scottish Union & National Insurance Co.*, (1901) 18 W.N. 275; apparently it appeared by the declaration that interest was not claimed under any contract.

**C.L.P. Act,
S. 24.**

Plaintiff cannot, by improperly specially indorsing a writ (as where the claim was really unliquidated) get the benefit of rules dealing with properly specially indorsed writs: *Nicholson v. Perrott*, (1901) 18 W.N. 113. See also *Campbell v. Kenny*, (1903) 20 W.N. 15.

Particulars.—It is irregular to deliver, without leave of a judge, different particulars from those indorsed; but if delivered and not set aside, the plaintiff may use them at the trial: *Fromant v. Ashley*, 1 E. & B. 723. And the declaration will not be struck out on that ground: *Marshall v. A.J.S. Bank*, (1899) 15 W.N. 245.

Payment.—By R. 73 (*post*), payment need not be pleaded where credited in the particulars of demand; but this rule does not apply where the plaintiff, seeking to recover a balance, does not state the particular sums credited. The plaintiff, in indorsing his writ, should have this rule in view, so as to avoid the costs of a successful plea of payment.

Credits should be given in accordance with the form in the Schedule; if the indorsement does not fulfil the requirements of the section, particulars must be filed with the declaration in accordance with R. 41: *Anthony v. Thompson*, (1864) 2 S.C.R. 343.

As to judgment by default, when the writ is specially indorsed, see s. 25 (*infra*). As to the costs of the declaration, if there be no special indorsement, see s. 26 (*post*). It is only when the defendant resides within the jurisdiction that final judgment on default is obtainable. As to writs for service without the jurisdiction, see *North v. Shierlaw*, (1897) 13 W.N. 163, where *Stephen, J.*, held that a writ for service without the jurisdiction could not be indorsed under this section.

PART III.

APPEARANCE, AND PROCEEDINGS IN DEFAULT OF APPEARANCE.

25. (1) In case of non-appearance by the defendant where the writ of summons is indorsed in the special form hereinbefore provided, the plaintiff, on filing an affidavit of due service of the writ in accordance with the provisions of this Act and a copy of such writ, may at once sign final judgment in the Form No. 6 contained in the Second Schedule hereto for—

Judgment in default of appearance where writ specially indorsed.

17 Vic. No. 21, s. 23.

- (a) any sum not exceeding the sum indorsed on the writ, together with interest at the rate specified (if any) to the date of the judgment; and
- (b) the sum prescribed for costs, unless the plaintiff claim more than such sum, in which case the costs shall be taxed in the ordinary way.

(2) The plaintiff may upon such judgment issue execution at the expiration of the time prescribed.

(3) Provided that the Court or a Judge may either before or after final judgment let in the defendant to defend upon an application supported by satisfactory affidavits accounting for the non-appearance and disclosing a defence upon the merits.

Indorsed in the special form.—As to special indorsement, see s. 24 (*ante*).

Affidavit of service.—See ss. 15 and 17 (*ante*) and see also *Sewell v. Sinclair*, (1884), 1 W.N. 32; and *Hudson Bros. v. Wilkinson & others*, (1890) 6 W.N. 114.

**C.L.P. Act,
S. 25.**

May at once sign judgment.—Judgment can only be signed under this section when no appearance has in fact been previously entered: see notes to s. 27 (*post*). As to signing judgment in vacation, see R. 10 (*d*).

For any sum not exceeding, etc.—Judgment should be signed for such amount only as is really due at the time of signing it: *Hodges v. Callaghan*, 2 C.B., N.S. 306; 26 L.J. C.P. 171; 3 Jur. N.S. 369; followed in Chambers by *Foster, J.*, in *Whipple v. Carson*, (6th Jan. 1893).

The sum prescribed for costs.—See 4th Schedule to Rules, "Costs in undefended actions." (*post*).

Issue execution.—Under R. 182 (*post*) the plaintiff, upon filing a verified account of what is justly due to him under the judgment, may issue execution forthwith. The old section, 23 of 17 Vic. No. 21, provided for execution issuing at the expiration of eight days; but the Court held in *Lazarus v. Stutchbury*, (1886) 7 N.S.W.R. 328; 3 W.N. 23; 2 W.N. 114, that the rule allowing execution forthwith should have effect. The present section gets rid of any doubt by allowing execution at the expiration of the time prescribed, *i.e.*, by Rule. Power to make Rules is conferred by s. 268 (*post*).

Provided that, etc.—In order to set aside a judgment under this section, it is necessary to disclose merits, and it is not sufficient to swear to them generally, as in a common affidavit of merits: *Whiley v. Whiley*, 4 C.B., N.S. 653, overruling upon this point *Warrington v. Leake*, 11 Exch. 304; *M'Lean v. Cronin*, (1882) T.T.R. 123. But the truth of the facts alleged will not be further inquired into upon the application by admitting affidavits in reply: *Warrington v. Leake* (*supra*).

A judgment will be set aside under this section, where any claim is indorsed upon the writ that is not properly indorseable under s. 24, if the judgment be signed for such claim: *Rogers v. Hunt*, 10 Ex. 474; 24 L.J. Ex. 23, and *Rodway v. Lucas*, 10 Ex. 667. The general equitable powers of the courts over judgments are not curtailed by the affirmative language of this section: *Hall v. Scotson*, 9 Exch. 238; 23 L.J. Ex. 85.

Affidavit of merits.—The defendant may be let in to defend after judgment signed upon an affidavit of merits. It has long been the practice to let in a defendant to defend on merits: *Listed v. Lee*, 1 Salk. 402; but the defence must be on the merits. Pleas of the Statute of Limitations: *Maddock v. Holmes*, 1 B. & P. 228; of bankruptcy: *Evans v. Gill*, 1 B. & P. 52; or infancy: *Delafield v. Tanner*, 5 Taunt. 856; *Cavallier v. Michael*, 17 L.T., N.S. 290, are defences on the merits within this rule. A plea to an attorney's action that no bill was delivered was, in *Beck v. Mordaunt*, 4 Dowl. 112, held not to be a plea to the merits; but in *Wilkinson v. Page* 1 D. & L. 913, *Tindal, C.J.*, expressed an opinion to a different effect.

The defendant must generally pay the costs of the application: *Listed v. Lee*, (*supra*), and plead issuably without delay. Sometimes he may be ordered to bring money into court: *Wade v. Simeon*, 13 M. & W. 637.

The affidavit may be made, not only by the defendant, if he is advised and believes, but by the attorney or his clerk, if he has been informed or instructed, and believes; or by an agent, if he state that from his instructions he believes: *Roubotham v. Dupree*, 5 Dowl. 557; *Schofield v. Huggins*, 3 Dowl. 427; see observations upon swearing "on information and belief" in *Arndt v. Porter*, 30 L.J. Ex. 19. The affidavit must show the merits to be merits to the action: *Bromley v. Gerish*, 1 D. & L. 768; see further *Tate v. Bodfield*, 3 Dowl. 218; *Bower v. Kemp*, 1 Dowl. 282; *Page v. South*, 7 Dowl. 412; *Crossby v. Innes*, 5 Dowl. 566.

For cases in our own courts where application has been made to set aside judgments signed for want of appearance, see *Manby v. Whelan*, (1884) 1 W.N. 41 (ejectment; instructions to appear miscarried); *Dixon v. Tyler* (*Ibid.*), 44; *Elliott v. Gough*, (*Ibid.*) 53, where judgment had been signed after tender of the amount due with an insufficient amount for costs—application dismissed: *Hoffnung v. Sinclair* (*Ibid.*) 47; *Federal Bank v. Bate* (1889) 5 W.N. 67; *Gorman v. Matthews*, (1897) 13 W.N. 224, where *Cohen, J.*, held that an offer by defendant to pay two guineas as costs of signing judgment ought not to have been refused, assessed the costs of signing judgment at 1½ guineas and made costs of the application costs in the cause.

Reference may be made here to analogous cases where application has been made to set aside a judgment regularly signed for want of a plea or replication; see *Marranan v. Robertson*, (1884) 1 W.N. 130 (judgment in default of a plea); *North v. Schultze*, 6 W.N. 111 (see R. 57 and notes); *Barnard v. Kellett*, (1891) 7 W.N. 100, where *Foster, J.*, in chambers, refused to set aside a judgment signed for want of a plea, on an affidavit stating that the defendant had a good defence on the merits, but on a further affidavit being filed disclosing the defence, granted the application on terms:

Proudfoot v. O'Brien, (1896) 13 W.N. 64; in this last case *Cohen*, J., after conferring with the Chief Justice, said there could be no formal rule as to the terms on which a judgment regularly signed for want of a plea would be set aside. "It should be in the discretion of the Judge to impose such terms as in any given case may appear to him to be just," and commenting on the rule supposed to be laid down in *Barnard v. Kellett* (*supra*), that security for the amount claimed must be given. **C.L.P. Act, s. 25.**

The application must be made promptly. Where defendant was an infant when judgment was signed, but knowing all the facts made no application for 15 years after coming of age, the application was refused with costs: *Woolley v. Tullock*, (1901) 18 W.N. 254.

Cases where judgments have been irregularly signed are dealt with under the different sections or rules in respect of which the irregularity took place.

Appeal.—There is an appeal to the Full Court from the decision of a Judge in Chambers on an application to set aside a judgment signed for want of appearance: *Butler v. Walsh*, (1895) 11 W.N. 117; see also *Warner v. Fisher*, (1875) 13 S.C.R. at page 352, and *Cross v. Goode*, (1886) 7 N.S.W.R. 72; 2 W.N. 70, and notes to Supreme Court and Circuit Courts Act, 1900, s. 20 (*post*).

As to time limited for appearance, see R. 33 (*post*).

26. (1) In case of such non-appearance where the writ of summons is not indorsed in the special form hereinbefore provided, the plaintiff, on filing an affidavit of due service of the writ of summons in accordance with the provisions of this Act and a copy of the writ of summons, may file a declaration indorsed with a notice to plead in eight days and sign judgment by default at the expiration of the time to plead so indorsed as aforesaid. Judgment in default of appearance where writ not specially indorsed. 17 Vic. No. 21, s. 24.

(2) If no plea is delivered, where the cause of action mentioned in the declaration is for any of the claims which might have been inserted in the special indorsement on the writ of summons hereinbefore provided, and the amount claimed is indorsed on the writ of summons, the judgment shall be final, and execution may issue for—

- (a) any sum not exceeding the sum indorsed on the writ, together with interest at the rate specified (if any); and
- (b) the sum prescribed for costs, unless the plaintiff claim more than such sum, in which case the costs shall be taxed in the ordinary way:

Provided always that in such case the plaintiff shall not be entitled to more costs than if he had made such special indorsement and signed judgment upon non-appearance.

Non-appearance.—But defendant may appear at any time before judgment signed, s. 27.

Indorsed.—As to special indorsement, see s. 24 (*ante*).

Affidavit of due service.—See notes to ss. 15 and 17 (*ante*).

If no plea is delivered.—For cases where judgment of *non pros.* or for want of a plea was signed, see notes to preceding section.

In *Flatau v. Best*, (1897) 13 W.N. 147, where the defendant pleaded without having entered an appearance, he was given leave to file an appearance, and his plea allowed to stand as if filed after appearance.

As to time for appearance, see R. 34.

27. The defendant may appear at any time before judgment, and if he appear after the time specified in the writ of summons he shall, after notice of such appearance to the plaintiff or his attorney, be in the same position as to pleadings and other proceedings in the action as if he had appeared in time: Appearance to be entered at any time before judgment. Ibid. s. 25.

**C.L.P. Act,
S. 27.**

Provided always that the defendant appearing after the time appointed by the writ shall not be entitled to any further time for pleading or any other proceeding than if he had appeared within such appointed time.

The defendant may appear, etc.—If the defendant does not appear, the plaintiff may proceed against him under ss. 25 or 26 (*ante*); if he does appear, the appearance must be in the form prescribed by s. 29 (*post*); and if a defendant appear in person, he must give the address required by s. 28 (*post*) and R. 395. Appearances entered under the old practice were set aside as irregular where they did not follow the requirements of the statute then in force: *Smith v. Wedderburn*, 4 D. & L. 297, and cases there cited. If the defendant is described in the writ by initials, or by a wrong name, the appearance should be entered in his true name, as thus, “William Wells Kilpin, sued as W. W. Kilpin”: *Lomax v. Kilpin*, 4 D. & L. 295. If an appearance be entered which is wrong or irregular, it ought to be amended; a new appearance would be irregular: *Bate v. Bolton*, 4 Dowl. 160, 677.

If two or more defendants in the same action appear by one attorney at the same time, their names are to be inserted in one appearance: R. 36 (*post*).

Appearance may be entered in vacation: *Ruddell v. McCulloch & another*, (1884) 5 N.S.W.R. 355; 1 W.N. 11.

After notice of such appearance to the plaintiff.—Notice of appearance should now be given in every case: R. 35.

Entry of appearance after time allowed.—If the defendant has not entered an appearance within the time allowed for so doing, he must, in order to be in the same position as if he had appeared in time, give notice to the plaintiff of such his appearance; but judgment signed after appearance, even though the plaintiff have no notice thereof, is irregular, and will be set aside upon terms: *Rhodes v. Bryant*, 2 F. & F. 265, *Willes, J.*; *Oake v. Moorecroft* L.R. 5 Q.B. 76, 78.

An appearance *in person* must be stated to be so: s. 29, and Schedule II., F. 7 (*post*).

It may be entered by a third person, though he be not an attorney: *Oake v. Moorecroft* (*supra*).

An infant can only appear by guardian: Co. Litt. 135 (b); *Frescobaldi v. Kynaston*, 2 Str. 784; *Leech v. Cladburn*, 2 L.M. & P. 614; *Carr v. Cooper*, 1 B. & S. 230; *Jarman v. Lucas*, 15 C.B., N.S. 474; 33 L.J. C.P. 108; he cannot appear by *prochein amy*: 2 Inst. 261; *Fitzgerald v. Villiers*, 3 Mod. 236; *Simpson v. Jackson*, Cro. Jac. 640. An infant may sue by guardian or by *prochein amy* admitted by the court for that purpose, but he cannot sue *in person* or by attorney. See as to the appointment of guardians *ad litem*, and generally as to actions by and against infants, Chitt. Pr. 12th ed. vol. ii. pp. 1240—1246. See also as to insolvency of *prochein amy*: *Lees v. Smith*, 5 H. & N. 632; 29 L.J. Ex. 294; and as to right of infant to moneys recovered in suit as against the attorney employed by the *prochein amy*: *Collins v. Brook* (*in error*), 5 H. & N. 700; 29 L.J. Ex. 255.

Should the time for pleading have expired, or nearly expired, the defendant should give notice of his appearance to the plaintiff's attorney, as pointed out in the section, and apply to a judge for further time to plead.

See *Flatau v. Best* cited in the note to preceding section as to entering an appearance after plea.

Appearance by the defendant in person to give address for service.

17 Vic. No. 21, s. 20.

28. (1) Every appearance by the defendant in person shall give an address at which it shall be sufficient to leave all pleadings and other proceedings not requiring personal service.

(2) If such address is not given the appearance shall not be received, and if an address so given is illusory or fictitious the appearance shall be irregular, and may be set aside by the Court or a Judge, and the plaintiff may be permitted to proceed by sticking up the proceedings in the prothonotary's office without further service.

Every appearance by the defendant in person shall give an address.—A book for the purpose of entering appearances, &c., is kept at the prothonotary's office. The address given must be within two miles from the General Post Office: R. 395 (*post*).

The reason of the latter provision of the section seems to be, that the appearance shows the defendant to be aware of the proceedings, and to be watching their course. Leave to stick up the proceedings must be obtained from the court or a judge. In order to obtain such leave, the plaintiff should show by affidavit that proper and sufficient inquiries have been made for the defendant. One visit to his residence, accompanied by inquiries in the neighbourhood, was not considered sufficient; *Fry v. Rogers*, 2 Dowl. 412; nor were inquiries at a public office, where the bill sued on was payable: *Hemming v. Duke*, 2 Dowl. 637. The particulars of the inquiries should be stated, and the application should generally be made to a judge at chambers *ex parte*, a rule of court under the old practice having been in such a case absolute in the first instance: *Bridges v. Austin*, 1 Dowl. 272.

But if no address be given, or the address given is more than two miles from the General Post Office, pleadings, &c., may be stuck up without leave: R. 396.

**C.L.P. Act,
S. 28.**

29. The mode of appearance to every such writ of summons, or under the authority of this Act, shall be by delivering to the proper officer a memorandum in writing according to the Form No. 7 contained in the Second Schedule hereto, or to the like effect dated the day of the delivery thereof.

Mode of appearance.
17 Vic. No. 21,
s. 27.

The mode of appearance.—An appearance in person need not be in the own proper person of the defendant, and the memorandum required by this section may be delivered by a third person on his behalf, though he be not an attorney: *Oake v. Moorecroft*, L.R. 5 Q.B. 76.

As to entering appearance in person, see s. 28, and R. 395 (*post*).

In vacation, see note to s. 27 (*ante*).

Notice of appearance should now be given in every case: R. 35 (*post*).

30. All such proceedings as are mentioned in any writ or notice issued under this Act may be had and taken in default of a defendant's appearance.

Proceedings mentioned in writ or notice may be had and taken.

See Schedule II, Forms 1, 3, 4 (*post*).

Ibid. s. 28.

31. In any action brought against two or more defendants where the writ of summons is indorsed in the special form hereinbefore provided, if one or more of such defendants only appear and another or others of them do not appear, the plaintiff may sign judgment against the defendant or defendants so not appearing, and—

Proceedings where only some of the defendants appear to a writ specially indorsed.

Ibid. s. 29.

- (a) before declaration against the other defendant or defendants issue execution thereupon, in which case he shall be taken to have abandoned his action against the defendant or defendants so appearing; or
- (b) before issuing such execution, declare against the defendant or defendants so appearing, stating by way of suggestion the judgment obtained against the other defendant or defendants not appearing, in which case the judgment so obtained against the defendant or defendants not appearing shall operate and take effect in like manner as a judgment by default obtained before the commencement of the Common Law Procedure Act of 1853 against one or more of several defendants in an action of debt.

Indorsed in the special form.—As to special indorsement see s. 24 (*ante*).

The plaintiff may sign judgment against the defendant or defendants so not appearing.—The judgment signed against the defendant who does not appear is final in form, though it becomes interlocutory in effect if plaintiff afterwards proceeds against the other defendants: *Beard v. Donaldson*, (1892) 9 W.N. 102; but as to the English law there cited from *Chitty quære*; see s. 39 (*post*), under which verdict and judgment can be had against one of several defendants in contract.

**C.L.P. Act,
s. 31.**

In *Slecombe v. Black*, (1886) 3 W.N. 22, an application was made by certain defendants to *compel* plaintiffs to sign judgment against other defendants and make the suggestion mentioned in the section; but the application was dismissed on its appearing that the other defendants had not been served.

Proceedings
against absent
defendants sued
as co-partners.

4 Vic. No. 6,
s. 15.

18 Vic. No. 6,
s. 2.

32. (1) In any action in which two or more defendants are sued as co-partners,—

(a) if any defendant is personally served with the writ of summons; and

(b) if the officer or person charged or entrusted with the service of the writ upon any other defendant makes an indorsement thereon to the effect that he has made diligent search for such defendant and has been unable to find him; and

(c) if at any time afterwards an affidavit is filed that to the best of the deponent's knowledge and belief the defendant served did in fact when the cause of action accrued carry on business within the jurisdiction of the Court as a co-partner jointly with the defendant or defendants as to whom such indorsement has been made, and that such last-mentioned defendant or defendants is or are out of the jurisdiction,

the plaintiff at his option may proceed against every such last-mentioned defendant (in case no appearance is entered for him) in the manner next hereinafter mentioned.

(2) Upon the filing of such affidavit, or as soon after as conveniently may be, the plaintiff shall cause a notice in the prescribed form, signed by himself or his attorney, to be published in the Gazette and in not less than one other Sydney newspaper, requiring every such defendant to appear.

(3) If on the day named in such notice (such day not being less than ten days next after the day of the publication of the same in the Gazette) no appearance be entered for such defendant or defendants, the plaintiff may cause such appearance to be entered and may proceed as if such defendant or defendant resided within the jurisdiction and had appeared to the action in person.

The reference to "cepi corpus" and arresting in the section of the Act 4 Vic. No. 6, has been omitted; there is now no such return.—(Commissioner's note).

Co-partners.—See note to s. 46 (*post*).

By the Registration of Firms' Act, 1902 (No. 100) persons carrying on business under a firm name must register the names of the members of the firm; see the Act, Statutes, Vol. 6.

As to form of notice, see R. 273, and Form II, 1st Schedule to Rules (*post*).

Similar proceed-
ings against ab-
sent defendants
not sued as
co-partners.

4 Vic. No. 6,
s. 16.

33. (1) The like appearance may be entered and proceedings had where two or more defendants are sued although not as co-partners (where as to any defendant such indorsement is made as aforesaid) upon an affidavit by or on behalf of the plaintiff that the cause of action against all the defendants accrued within the jurisdiction, and that the defendant or defendants as to whom such indorsement has been made is or are out of the jurisdiction.

(2) Provided that in addition to the publication of such notice as aforesaid the plaintiff shall give security by bond, before any such appearance is entered by him, to such amount

and in such form as a Judge shall order, conditioned to repay all such sums as he shall recover in the action against any such absent defendant, together with all costs sustained by such defendant in the premises in case the judgment therein against him is afterwards vacated, reversed, or altered. **C.L.P. Act, s. 33.**

(3) Every such defendant shall have the like remedy, and the same proceedings may be taken on his behalf for procuring the reversal of such judgment so far as the same affects such defendant, as are hereinafter provided with respect to defendants against whose property there has been issued a writ of foreign attachment.

(4) The provisions of section two hundred and eight shall apply to applications and proceedings under this and the next preceding section. **4 Vic. No. 6, s. 25.**

(5) This and the next preceding section shall not extend to any action of trespass or other action in tort (trover or detinue excepted), but shall extend only to actions on or arising out of contract. **Ibid. s. 23.**

Foreign attachment.—See ss. 202, *et seq*; see R. 273 (*post*).

PART IV.

JOINDER OF PARTIES.

34. (1) At any time before the trial of an action, the Court or a Judge may order that any person originally joined as plaintiff shall be struck out from such action if it appears to the Court or Judge that injustice will not be done by such amendment, and that the person to be struck out was originally introduced without his consent, or that such person consents either in person or by writing under his hand to be so struck out. **Misjoinder of plaintiffs : amendment before trial. 17 Vic. No. 21, s. 30.**

(2) Such amendment shall be made upon such terms as to the amendment of the pleadings (if any), postponement of the trial, and otherwise as the Court or Judge thinks proper.

The misjoinder of plaintiffs is a fatal objection in actions either of contract or of tort, and must be amended either under this or the following section, otherwise there will be a non-suit or verdict for the defendant.

May order.—The order must be obtained on summons, not *ex parte*: *Redgate v. Churchwood*, (1881) T.T.R. 44. It is sufficient *prima facie* for the applicant to state in his affidavit that "injustice will not be done" by the amendment: *Lanagan v. Magill*, (1900) 17 W.N. 76.

The application should be to amend the writ and copy and all subsequent proceedings. Amendments are allowed generally only upon terms as to costs, as to which the court or judge exercises discretion: *Wall v. Lyon*, 1 Dowl. 714; and may fix the amount of costs: *Collins v. Aaron*, 6 Dowl. 423.

The defendant should have inserted in the order the terms on which he is to plead. If he had already pleaded, the plea, under the old (Eng.) practice would have been considered a plea to the amended declaration: *Fagg v. Borsley*, 2 Dowl. 107; and is so still, unless he pleads *de novo*, s. 101 (*post*). The defendant has now two days to plead *de novo* after amendment, unless it is otherwise ordered; if the declaration is amended before plea the defendant must still plead within the time limited to do so, or within the two days, unless it is otherwise ordered: s. 101 (*post*).

As to the rights of a person joined as plaintiff without his consent: see *Proudfoot & another v. Bank of New Zealand*, (1885) 6 N.S.W.R. 170; 2 W.N. 15. Proudfoot began an action in the name of himself, Logan and others alleging that Logan

**C.L.P. Act,
S. 34.**

was a partner; Logan applied to have his name struck out on the ground that the action was instituted without his authority. This was refused; but it was held that he was entitled to be indemnified against costs.

Misjoinder of
plaintiffs:
amendment
at trial.
17 Vic. No. 21,
s. 31.

35. (1) If it appears at the trial of an action that there has been a misjoinder of plaintiffs, such misjoinder may be amended as a variance at the trial by the Court or a Judge in like manner as to the mode of amendment and proceedings consequent thereon, or as near thereto as the circumstances of the case will admit, as in the case of amendments of variances, if it appears to such Court or Judge that such misjoinder was not for the purpose of obtaining an undue advantage, and that injustice will not be done by such amendment, and that the person to be struck out was originally introduced without his consent, or that such person consents either in person or by writing under his hand to be so struck out.

(2) Such amendment shall be made upon such terms as the Court or Judge thinks proper.

(3) Every Circuit Court or Officer presiding at any trial shall be deemed a Court or Judge within the meaning of this section.

Amendments.—Under this section, the amendments referred to under s. 34 (*ante*) may be made at the trial. The amendment must be made during the trial and before verdict: *Brashier v. Jackson*, 8 Dowl. 784; *Robson v. Doyle*, 3 E. & B 396; and see also *Wickens v. Steel*, 2 C.B., N.S. 488; but see *Roberts v. Snell*, 1 M. & G. 773; *Sergeant v. Chafy*, 6 Nev. & M. 819. The judge may refuse to amend, and if he do so, the remedy is to apply to the court for a new trial: *Whitwell v. Scheer*, 8 Ad. & E. 301, but the court will not interfere if the judge do not "plainly appear to have been wrong": *Sainsbury v. Matthews*, 4 M. & W. 347; and, indeed, grave doubts exist as to the right or duty of the court to interfere with the exercise by the judge presiding at the trial of the discretionary power vested in him; see *Roles v. Davis*, 4 H. & N. 484; *Tennyson v. O'Brien*, 5 E. & B. 497; *Wilkin v. Read*, 15 C.B. 192, and *Holden v. Ballantyne*, 29 L.J. Q.B. 148. The amendment ought to be made, so that no additional expense be thrown on the defendant; and if the defendant pays at once the sum claimed under the amended declaration, he will be entitled to his costs from the time he might have paid money into court; it is otherwise if he defends the action: *Smith v. Brandram*, 2 M. & G. 250. The terms on which the amendment will be allowed are in the discretion of the judge at the trial, whose decision will not be reviewed by the court: *Tomlinson v. Bolland*, 4 Q.B. 642.

It would seem that the powers conferred by s. 260 (*post*) do not apply to cases within the section: *Wickens v. Steel*, 2 C.B., N.S. 488; and *Holden v. Ballantyne* 29 L.J.Q.B. 148.

See notes to ss. 34, 38, 40, and 42.

Non-joinder of
plaintiffs:
amendment
before trial.
Ibid. s. 30.

36. (1) At any time before the trial of an action, the Court or a Judge may order that any person not joined as plaintiff shall be so joined, if it appears to the Court or Judge that injustice will not be done by such amendment, and that such person consents either in person or by writing under his hand to be so joined.

(2) Such amendment shall be made upon such terms as to the amendment of the pleadings (if any), postponement of the trial, and otherwise as the Court or Judge thinks proper.

(3) When any such amendment has been made, the liability of any person so added as co-plaintiff shall subject to any terms imposed as aforesaid be the same as if such person had been originally joined in such cause.

See generally notes to s. 34 as to the practice.

Non-joinder of plaintiffs in contract.—The omission in actions on contract of a party as plaintiff is fatal, except, indeed, in the case of executors: *Jones v. Smith*, 1 Exch. 831, where the cases are collected; see also *Agacio v. Forbes*, 14 Moore, P.C. C. 160. If the objection appears on the pleadings, it may be taken advantage of by demurrer or by motion in arrest of judgment; but if it does not appear upon the pleadings, and arises upon the trial by way of variance between the contract declared upon and that proved, it would, unless amended, lead to a non-suit or to an adverse verdict: *Chanter v. Leese*, 4 M. & W. 295. But the nonjoinder may be remedied under the above section at any time before the trial, or, under the following section, even at the trial, unless notice of objection to the nonjoinder has been given before or with the plea. If such notice of objection be given, or if a plea in abatement be pleaded (now a very unusual course, since the notice introduced by this Act answers the same purpose, and need not, as a plea in abatement must, be verified by affidavit), the plaintiff may amend under s. 38 (*post*).

**C.L.P. Act,
s. 35.**

Nonjoinder of plaintiffs in tort.—In actions on tort the nonjoinder of parties who are jointly wronged can only be taken advantage of by notice under s. 37 or plea in abatement: *Addison v. Overend*, 6 T.R. 766; *Broadbent v. Ledward*, 11 Ad. & E. 209; *Phillips v. Claggett*, 10 M. & W. 102; if neither of those steps be taken, the plaintiff will be entitled to recover his share only of the damages sustained: *Sedgworth v. Overend*, 7 T.R. 279; *Bloxham v. Hubbard*, 5 East, 407.

Nonjoinder of executors.—The nonjoinder of a co-executor as plaintiff can be objected to only by a plea in abatement, whether the action be one of contract or tort: 2 Wms. Saund, 291, *k, l*.

As to pleas in abatement, see notes to s. 41 (*post*).

37. (1) If it appears at the trial of an action that some person not joined as plaintiff ought to have been so joined and the defendant has not at or before the time of pleading given notice in writing that he objects to such non-joinder, specifying therein the names of such person, such non-joinder may be amended as a variance at the trial by the Court or Judge in like manner as to the mode of amendment and proceedings consequent thereon, or as near thereto as the circumstances of the case will admit, as in the case of amendments of variances, if it appears to the Court or Judge that such non-joinder was not for the purpose of obtaining an undue advantage, and that injustice will not be done by such amendment, and that such person consents either in person or by writing under his hand to be so joined.

Non-joinder of
plaintiffs:
amendment at
trial.

17 Vic. No. 21,
s. 31.

(2) Such amendment shall be made upon such terms as the Court or Judge thinks proper.

(3) When any such amendment has been made, the liability of any person added as co-plaintiff shall, subject to any terms imposed as aforesaid, be the same as if such person had been originally joined in such action.

(4) Every Circuit Court or officer presiding at any trial shall be deemed a Court or Judge within the meaning of this section.

See notes to ss. 35, 36 (*ante*).

38. (1) If such notice is given, or if any plea in abatement of non-joinder of a person as co-plaintiff (in cases where such plea may be pleaded) is pleaded by the defendant, the plaintiff may, without any order, amend the writ of summons and other proceedings before plea by adding the name of the person named in such notice or plea, and may proceed in the action without any further appearance, on payment of the costs of and occasioned by such amendment only.

Amendment
after notice or
plea of non-
joinder of
plaintiff.

Ibid. s. 32.

**C.L.P. Act,
S. 38.**

(2) In such case the defendant shall be at liberty to plead *de novo*.

Notice . . . or . . . Plea—On receiving a notice or plea in abatement, the plaintiff may amend the writ, appearance and declaration; but the payment of the costs of and occasioned by the amendment being made a conditioned precedent to the amendment the plaintiff should, therefore, have the costs of the defendant taxed, and pay or tender them to the defendant, otherwise his proceeding in the action would be irregular: *Levy v. Drew*, 5 D. & L. 307.

As to pleas in abatement, see notes to s. 41 (*post*). The consent in writing of the person whose name is to be added is required, unless dispensed with by a judge: R. 31 (*post*).

Verdict and judgment against some only of several joint contractors.
4 Vic. No. 6, s. 19.

39. (1) If two or more persons are sued as joint contractors, the plaintiff shall be entitled to a judgment (or to a verdict and judgment, as the case may be) against such of the defendants as appear to be liable, although one or more of the defendants appear not to be liable.

(2) In every such case the defendant or defendants not liable shall have judgment, and be entitled to costs against the plaintiff, and to the like remedy for the same as a defendant has in any ordinary case.

This and the next following section taken from different Acts appear somewhat inconsistent; and it was argued in *Spencer v. Bluett*, (1901) 18 W.N. 1, that misjoinder of a defendant in contract was still a variance, fatal unless amended; but the court did not assent to that view. It was held in that case that one defendant could plead that the contract being made with him alone, he had a cross action.

Joint contractors.—In *Australian Loan Co. v. Kirschner*, (1887) 8 N.S.W.R. 296, it was held that this section did not apply where husband and wife were sued on a p.n. signed by the husband for the wife, that they could not be looked on as joint contractors; and that the section only applied at the trial and not (*semble*) where the point arose on demurrer; *sed q.*

A District Court Judge trying a Supreme Court issue may find a verdict under this section: *Bray v. Tayler*, (1877) Knox. 201.

A verdict for three defendants in contract and no verdict as to a fourth defendant was held good: *Hargraves v. Cohen*, (1873) 12 S.C.R., 310; though this enactment was apparently not referred to.

Where certain persons were sued as members of a co-partnership under s. 46 (*post*), and a liability shown against one of the persons sued only, it was held that the plaintiffs were rightly nonsuited, and that there could not be a verdict under this section against the defendant shown to be liable: *Kenwood v. Hoskings*, (1895) 16 N.S.W.R. 45; 11 W.N. 126.

Misjoinder of defendants: amendment before or at trial.
17 Vic. No. 21, s. 33.

40. (1) In case of the joinder of too many defendants in any action on contract, the Court or a Judge may at any time before the trial order that the name or names of one or more of such defendants be struck out if it appears to the Court or Judge that injustice will not be done by such amendment.

(2) Such amendment shall be made upon such terms as the Court or Judge thinks proper.

(3) If it appears at the trial of any action on contract that there has been a misjoinder of defendants, such misjoinder may be amended as a variance at the trial in like manner as the misjoinder of plaintiffs has been hereinbefore directed to be amended, and upon such terms as the Court or Judge or other presiding officer thinks proper.

Misjoinder of defendants in contract was fatal: *Robson v. Doyle*, 3 E. & B. 396; *Wickens v. Steel*, 2 C.B., N.S. 488; unless amended before verdict; but see now the preceding section 39. In tort a defendant wrongly joined is entitled to a verdict, but

that does not effect the liability of another defendant : *Govett v. Radnidge*, 3 East 62 : **C.L.P. Act, s. 40.**
Bretherton v. Wood, 3 B. & B. 54 ; *Possi v. Shipton*, 8 A. & E. 963 ; *Morrow v. Belcher*, 4 B. & C. 704.

Before trial.—See notes to s. 34 (*ante*) ; and *Palmer v. Beale*, 3 Dowl. 529 ; *Jackson v. Dunn*, 4 Q.B. 209.

At the trial.—See notes to s. 35 (*ante*) ; and *Crauford v. Cocks*, 6 Ex. 287 ; *Coutburn v. Wearing*, 9 Ex. 207 ; *Johnson v. Goslett*, 18 C.B. 728 ; *Mulford v. Griffin*, 1 F. & F. 145 ; *Greaves v. Humphries*, 4 E. & B. 851.

This section was held not applicable where a party was made a co-defendant on purpose to try his liability : *Wickens v. Steel*, 2 C.B. N.S. 488 ; *Vanderbyl v. McKenna*, L.R. 3 C.P. 252.

As to costs of a defendant struck out, see *Redway v. Webber*, 13 C.B., N.S. 254 ; 32 L.J. C.P. 84.

41. (1) No plea in abatement for the non-joinder of any person as a co-defendant shall be allowed in any action unless it is stated in the plea that such person is resident within the jurisdiction of the Court, and unless the place of his residence is stated with convenient certainty in an affidavit verifying such plea. Plea in abatement for non-joinder of defendant. 4 Vic. No. 6, s. 20.

(2) To any such plea the plaintiff may reply that such person has been discharged under the provisions of any Act relating to bankruptcy, or the relief of insolvent debtors.

Plea in abatement.—A plea in abatement should mention *all* the co-defendants not joined, so that the plaintiff may have a better writ ; otherwise, if the plaintiff take issue on the plea, he will succeed : *Crellin v. Calvert*, 14 M. & W. 11. So if any one of the co-contractors is not resident within the jurisdiction, this plea cannot be pleaded successfully : *Joll v. Curson*, 4 C.B. 249.

Upon a plea in abatement for nonjoinder, the plaintiff (if the plea is well founded, or if it is doubtful whether it is well founded or not) ought to amend the writ (which he may do without any order), serve the amended writ on the persons thus added as defendants, and declare *de novo*. In such case the new declaration must commence in a special form, see s. 71 (*post*).

The plea must state the persons not joined to be still living : 1 Wms. Saund. 291 ; and to be residing within the jurisdiction of the Court.

The affidavit must be delivered with the plea, unless an extension of time be granted : *Johnson v. Popplewell*, 2 Tyrw. 717.

The title of the affidavit must be strictly accurate in the names of the parties : *Poole v. Pembrey*, 1 Dowl. 692 ; *Fletcher v. Lechmere*, 2 Dowl. N.S. 848. The verification must be absolute, and the words "is true in substance and fact" are essential so as to make the affidavit precise : *Onslow v. Booth*, Str. 705. If the affidavit is insufficient, the plea may be treated as a nullity : *Bray v. Halter*, 2 Moore, 213. *Garrett v. Hooper*, 1 Dowl. 28 ; and the plaintiff may sign judgment : *Lovell v. Walker*, 8 M. & W. 299. As to the statement of the residence of the party not joined as a defendant, see also *Wheatley v. Golney*, 9 Dowl. 1019 ; *Lambe v. Smythe*, 15 M. & W. 433 ; *Newton v. Stewart*, 4 D. & L. 89 ; *White v. Gascoigne*, 3 Exch. 36 ; *Maybury v. Mudie* (*supra*).

A plea in abatement must be pleaded within *four* days after declaration : *Ryland v. Wormwald*, 5 Dowl. 581.

As to pleading *de novo* after amendment, see s. 101 (*post*).

Reply.—Instead of replying plaintiff may amend under s. 42.

The replication may be a joinder of issue ; and on this plaintiff may show at the trial that the suggested defendant is discharged under a Statute of Limitations, General Legal Procedure Act, 1902, s. 9 (*post*) ; but bankruptcy must be specially replied, according to the section.

Upon issue taken on a plea in abatement, plaintiff must be prepared to prove his demand or he will not recover : *Welcher v. Le Pelletier*, 1 Camp. 481.

In an action on the common counts against two defendants, one of the defendants pleaded that the contract was with him alone, and that he had a cross action. *Held*, a good plea : *Spencer & another v. Bluett & another*, (1901) 18 W.N. 1.

G.L.P. Act,**S. 42.**

Amendment
after plea in
abatement for
non-joinder of
defendant.

17 Vic. No. 21,
s. 34.

42. In any action on contract, where the non-joinder of any person as a co-defendant is pleaded in abatement, the plaintiff may, without any order, amend the writ of summons and the declaration by adding the name of such person, and serve the amended writ upon such person, and proceed against the original defendant and such person :

Provided that the date of such amendment shall as between such person and the plaintiff be considered for all purposes as the commencement of the action.

Non-joinder of any person as a co-defendant.—In an action on contract this is not a fatal objection, and can only be taken advantage of by plea in abatement *Rice v. Shute*, 5 Burr. 2613 ; which can only be pleaded when the alleged co-defendant is within the jurisdiction ; and which must be pleaded within four days from the delivery or filing of the declaration, and must be verified by affidavit (see *ante*, s. 41). It must be borne in mind that a judgment recovered against one of several joint debtors is a good plea in bar to an action against another of them in respect of the joint as distinguished from the several liability (if any) : *King v. Hoare*, 13 M. & W. 494.

The non-joinder of defendants in tort.—Is no ground of objection ; each of several who jointly commit wrong is separately liable for the whole wrong done : *Sutton v. Clarke*, 6 Taunt. 29 ; and see *Reg. v. Brown*, 7 E. & B. 757.

The alteration of the writ, by adding the name of the defendant, whose non-joinder has been pleaded, does not vitiate it, as it otherwise would : *Siggers v. Sansom*, 2 Dowl. 745.

Amend the writ.—Where a writ has been amended under this section, the person or persons named in the plea may stay proceedings against himself or themselves by payment of the debt and of the costs of the writ within four days of service upon him or them ; per Martin B. : *Meason v. Mountcastle*, 1 F. & F. 721.

And as to costs see ss. 43, 44 (*infra*).

Instead of amending the plaintiff may apparently enter a *cassetur breve*, and so avoid costs : Chitty's Archbold, 917.

Provided, etc.—The proviso preserves any rights of the new defendant under the Statutes of Limitations : see General Legal Procedure Act, 1902, s. 9 (*post*).

Proceedings
after such
amendment.
Ibid. s. 35.

43. (1) If upon the trial of the action after such plea in abatement and amendment it appears that the person so named in such plea is jointly liable with the original defendant, the original defendant shall be entitled as against the plaintiff to the costs of such plea and amendment.

(2) If upon such trial it appears that any original defendant is liable, but that any person named in such plea is not liable, every defendant not so liable shall have judgment, and shall be entitled to his costs as against the plaintiff, who shall be allowed the same together with the costs of such plea and amendment as costs in the cause against the defendant who has so pleaded the non-joinder of such person.

Costs of such plea and amendment.—A plaintiff sued M. for a money demand M. pleaded in abatement the nonjoinder of B. and G. The plaintiff amended his pleadings, adding B. and G. as joint defendants. M. pleaded, as to £230 parcel, etc., payment into court, and as to the residue, never indebted. B. and G. each separately pleaded never indebted to the whole demand. On the trial a verdict was found for M., that no more than £230 were due ; but as to B. and G., that they were jointly liable with M. for £212 :—Held by Crompton, J., in the Bail Court, that M. was entitled under this section, to the costs of the plea in abatement and of the amendment and also to the general costs of the cause, and of the trial ; and held also, that the plaintiffs were not entitled to any costs as against B. and G. : *Cazneau v. Morrice and others*, 25 L.J. Q.B. 126.

44. If after such plea in abatement the plaintiff without proceeding to trial commences another action against the original defendant and the person named in such plea, and if thereafter it appears, either by the pleadings in such action or upon the trial, that any original defendant is liable, but that any person named in such plea is not liable, every defendant not so liable shall have judgment and shall be entitled to his costs as against the plaintiff, who shall be allowed the same as costs in the cause against any defendant so liable who has so pleaded the non-joinder of such person.

**C.L.P. Act,
S. 44.**

Proceedings where new action commenced after plea in abatement.

4 Vic. No. 6, s. 21.

The words, "all the original defendants are liable," (in the original section) have been altered to "any original defendant is liable." The former words seem to have come from copying too slavishly s. 10 of 3 and 4 Wm. IV., c. 42, overlooking the fact that by s. 19 of 4 Vic., No. 6, the English law had been altered, so that it was no longer necessary to prove all the defendants liable in an action of contract.—(Commissioner's note.)

45. Any defendant who has pleaded in abatement the non-joinder of any person as a co-defendant may at the trial adduce evidence of the liability of such person.

Evidence in support of such plea.

Ibid.

17 Vic. No. 21, s. 35.

46. (1) In any case where business is carried on within the jurisdiction of the Court by persons in co-partnership, or by one individual or more assuming the style of a co-partnership, or acting as agent or agents for a co-partnership, if the names of the actual members of such co-partnership or of any of them are unknown, such co-partnership and the several members thereof, or the persons or person having carried on business under the style of any such co-partnership, may be sued in the name or names of—

Co-partnerships all of whose members are not known.

4 Vic. No. 6, s. 17.

(a) any one or more of the members of such co-partnership on behalf of all the members composing the same ; or

(b) any such agent or agents for and on behalf of such co-partnership,

so that in all cases wherein it would have been necessary but for this enactment to mention the names of all the members composing such co-partnership, it shall be sufficient to mention only the name or names of such one or more member or members or of such agent or agents on behalf of such co-partnership.

(2) Every judgment obtained in any such action shall have the same effect and operation upon the property both real and personal of such co-partnership, and also upon the property and persons of the several members thereof when discovered, whether such property be joint or separate, as if every member of such co-partnership had been actually and in fact a defendant in the action.

(3) This section shall not extend to any action of trespass or other action in tort (trover or detinue excepted) but shall extend only to actions on or arising out of contract.

Business carried on by persons in co-partnership.—Members of a club are not such persons: *Elliott v. Bourne*, (1895) 11 W.N. 191.

NAMES UNKNOWN.—It is essential to state that the names of the members of the co-partnership, or of some of them, as the case may be, are unknown to the plaintiff: *Metcalf v. Holdsworth*, (1894) 10 W.N. 222; *Day v. Wolsley*, (1883) T.T.R. 182; *Toogood v. Grenfell*, (1846) Stephen's Sup. 120. See now the Registration of Firms Act, 1902 (No. 100).

C.L.P. Act, In the name of member or agent.—This must distinctly appear : see next section 47.
S. 46.

This section shall not extend to any action of trespass, etc.—See *Metcalfe v. Holdsworth* (*supra*).

Pleadings.

4 Vic. No. 6,
s. 18.

47. Provided that in every writ of summons and other writ issued and declaration or other pleading filed on behalf of the plaintiff in any action brought under the provisions of the last preceding section, the style or firm of the co-partnership shall be specified, and it shall distinctly appear that the defendant sued is so sued either as a member or as agent for and on behalf of a co-partnership.

The requirements of the statute must be strictly followed. Where it was not made to appear distinctly upon the writ and other proceedings whether the defendant named was sued as member or agent, the writ and all subsequent proceedings, including judgment and *fi. fa.*, were set aside with leave to amend : *Tangyes v. Nelson*, (1887) 3 W.N. 100.

See notes to preceding section.

Liability of
agent.

Ibid.

48. No agent so sued on behalf of a co-partnership shall, by reason only of his being so sued, be liable in person or in property to any judgment obtained in such action.

PART V.

JOINDER OF CAUSES OF ACTION.

Joinder of
different causes
of action.
17 Vic. No. 21,
s. 37.

49. (1) Causes of action of whatever kind, provided they are by and against the same parties and in the same rights, may be joined in the same suit ; but this shall not extend to replevin or ejectment.

(2) Where two or more of the causes of action so joined are local and arise in different districts, the venue may be laid in either of such districts.

(3) The Court or a Judge may prevent the trial of different causes of action together if such trial would be inexpedient, and in such case may order separate records to be made up and separate trials to be had.

In the same right.—Counts by the plaintiff as an individual cannot be joined with counts by him as an executor : 2 Wms. Saund. 117 f (2) ; Bullen & Leake, 152.

Before the (Eng.) stat. 32 & 33 Vict. c. 68 rendered the parties in actions for breach of promise of marriage competent witnesses, the Court of Exchequer refused to allow a count for an annuity to be joined with a count for breach of promise of marriage, because the parties would thus have been let in as witnesses : *Sherratt v. Webster*, 8 L.T., N.S. 254 ; and where in an action for breach of promise of marriage the declaration contained money counts, in respect of which the defendant paid money into court, *Pollock*, C.B., at the trial, ordered, under this section, that the causes of action should be tried separately : *Frean v. Watley*, 4 F. & F. 1038.

As to the joinder of several counts on the one cause of action, see R. 47 (*post*). See also *Stockdale v. Hamilton* (No. 1), (1865) 4 S.C.R. 313.

As to the venue, see ss. 108 and 109 (*post*).

Joinder of
claims by hus-
band and wife
with claims in
right of
husband.
Ibid. s. 36.

50. In any action brought by a man and his wife for an injury done to the wife in respect of which she is necessarily joined as co-plaintiff, the husband may add thereto claims in his own right, and separate actions brought in respect of such claims may be consolidated if the Court or a Judge thinks fit :

Provided that in the case of the death of either plaintiff **G.L.P. Act,**
such action so far only as relates to the causes of action (if any) **S. 50.**
which do not survive shall abate.

The above enactment is limited to actions "for an injury done to his wife." It permits the husband to add to the joint cause of action claims arising to himself in his own right; but he may still bring his separate action: *Brockbank v. Whitehaven Junction Ry. Co.*, 31 L.J., Ex. 349.

Where a husband brought an action for personal injury to himself and to his trade by an explosion, and he and his wife brought a separate action for injuries sustained by her resulting from the same explosion; the Court of Exchequer consolidated the two actions under this section: *Hemstead v. Phoenix Gas Co.*, 3 H. & C. 745; 34 L.J. Ex. 108. See also *Morley v. Midland Ry. Co.*, 3 F. & F. 961 (cor. *Crompton, J.*)

As to accounts stated with husband and wife, see *Johnson and wife v. Lucas*, 1 E. & B. 659; 22 L.J. Q.B. 174.

In the case of *Dengate v. Gardiner*, 4 M. & W. 5, which was an action for slander of the wife, whereby she lost employment, evidence of this special damage was not admitted in an action by the husband and wife. The profit of the wife's wages are entirely the husband's, and "he alone (said Lord Abinger) can sue for the loss of them, just as in trespass by husband and wife for an assault on the wife, the surgeon's bill cannot be recovered. The right of action would not survive to her." The husband, therefore, in case of slander of his wife, was formerly obliged to sue alone for any special damage; just as in trespass, he was compelled to bring a separate action for the surgeon's bill. This case is still a useful example, although perhaps since the Married Women's Property Act, 1870, the decision would be otherwise: see s. 1. Where the defendant said of the plaintiff's wife, "you are a nuisance to live beside of and your house is no better than a bawdy-house;" it was held that an action for this slander might be maintained by the husband alone: *Nickle v. Reynolds*, 7 C.B., N.S. 114.

If the claims of the husband in his own right are sued for in the same action, they must be set out in separate counts.

But see now the Married Women's Property Act, 1901; and *Burton v. Cooke*, (1884) 5 N.S.W.R. 197.

PART VI.

DETERMINATION OF QUESTIONS RAISED BY CONSENT WITHOUT PLEADING.

51. (1) Where the parties to an action are agreed as to the questions of fact to be decided between them, they may, after writ issued and before judgment, by consent and order of a Judge (which order any Judge may make upon being satisfied that the parties have a bona fide interest in the decision of such questions, and that the same are fit to be tried), proceed to the trial of any such questions of fact without formal pleadings.

Trial of questions of fact without pleading.
17 Vic. No. 21, s. 38.

(2) Such questions may be stated for trial in an issue in the Form No. 8 contained in the Second Schedule hereto.

(3) Such issue may be entered for trial and tried accordingly in the same manner as any issue joined in an ordinary action, and the proceedings in such action and issue shall be under and subject to the ordinary control and jurisdiction of the Court as in other actions.

Bona fide interest.—The judge must be satisfied that the parties have a bona fide interest in the decision of the question: see *Doe d. Duntze v. Duntze*, 6 C.B. 100, cited (*post*), notes to s. 55.

**C.L.P. Act,
s. 51.**

Other powers to direct the trial of feigned issues and questions of fact, and the hearing of special cases on questions of law are conferred on the court by the General Legal Procedure Act, 1902, ss. 10-13 (*post*). As to ejectment, see s. 221 (*post*).

Agreement for payment of money and costs according to result of issue.
17 Vic. No. 21, s. 39.

52. The parties may, if they think fit, enter into an agreement in writing, which shall be embodied in the said or any subsequent order, that upon the finding of the jury in the affirmative or negative of such issue a sum of money fixed by the parties or to be ascertained by the jury upon a question inserted in the issue for that purpose shall be paid by one of such parties to the other of them, either with or without the costs of the action.

Judgment and execution.
Ibid. s. 40.

53. Upon the finding of the jury in any such issue judgment may be entered for the sum so agreed or ascertained with or without costs, as the case may be; and execution may issue upon such judgment forthwith, unless otherwise agreed, or unless the Court or a Judge otherwise orders for the purpose of giving either party an opportunity to move to set aside the verdict or for a new trial.

Record of proceedings and effect of judgment.
Ibid. s. 41.

54. The proceedings upon such issue may be recorded at the instance of either party, and the judgment, whether actually recorded or not, shall have the same effect as any other judgment in a contested action.

Special case.
Ibid. s. 42.

55. The parties may after writ issued and before judgment by consent and order of a Judge state any question or questions of law in a special case for the opinion of the Court without any pleadings.

Any question or questions of law.—Upon a special case stated by consent the court is not called upon to express an opinion upon abstract points, but only upon the points legally raised by the special case: *Scottish Australian Investment Co. v. Walker*, (1889) 10 N.S.W.R. 32; 5 W.N. 67.

For the opinion of the court.—The court will decline to give any opinion when there is reason to believe that the action is not *bona fide* brought for the purpose of determining a matter in controversy between the parties. In a case where, in the opinion of the court, the parties merely desired to allay a doubt as to the true construction of a will, the Court of Common Pleas declined to give any opinion: *Doe d. Duntze v. Duntze*, 6 C.B. 100. The case should be confined to questions of law; if matters of fact are in issue the court will leave the parties to go to a jury: *Aldridge v. Gt. W. Ry. Co.*, 3 M. & G. 515; see also *Price v. Quarrel*, 12 Ad. & E. 784.

It has been thought that when a special case under this section has been settled, it will not be amended by the court unless by consent of the parties: *Mersey Docks &c. v. Jones*, 29 L.J. C.P. 239; and see *Notman v. Anchor Insurance Co.*, 6 C.B. N.S. 536. In the absence of fraud or material mistake in the facts, the court will not after judgment entertain a motion to amend and rehear the case: *Ganthonny v. Witan*, 17 L.T., N.S. 117. In a case, however, where a verdict was found subject to a special case, the court allowed the amendment of the pleadings: *Carpenter v. Parker*, 3 C.B., N.S. 206; 27 L.J. C.P. 78.

As to practice in ejectment, see s. 221 (*post*).

Copies of the special case must be filed and served under R. 167 (*post*).

The court may order a special case to be stated, General Legal Procedure Act, 1902, s. 13 (*post*).

In special cases the plaintiff begins: *Rossiter v. Dawson*, (1862) 1 S.C.R. 55.

Agreement as to payment of money and costs according to judgment upon special case.
Ibid. s. 43.

56. (1) The parties may if they think fit enter into an agreement in writing, which shall be embodied in the said or any subsequent order, that upon the judgment of the Court being given in the affirmative or negative of the question or questions of law raised by such special case a sum of money to be fixed by the

parties or to be ascertained by the Court or in such manner as **C.L.P. Act,** the Court may direct shall be paid by one of such parties to the **S. 56.** other of them, either with or without costs of the action.

(2) The judgment of the Court may be entered for the sum so agreed or ascertained with or without costs as the case may be, and execution may issue upon such judgment forthwith, unless otherwise agreed. Judgment and execution.
17 Vic. No. 21,
s. 43.

57. In case no agreement is entered into as to the costs of such action, the costs shall follow the event and be recovered by the successful party. Costs to follow the event unless otherwise agreed.
Ibid. s. 44.

PART VII.

PLEADING.

Language and form of pleadings in general.

58. In any pleading statements which need not be proved shall be omitted, such as— Fictitious and needless averments not to be made.
Ibid. s. 45.

- (a) the statement of time, quantity, quality, and value, where these are immaterial ;
- (b) the statement of losing and finding and bailment in actions for goods or their value ;
- (c) the statement of acts of trespass having been committed with force and arms and against the peace of our Lady the Queen ;
- (d) the statement of promises which need not be proved, as promises in indebitatus counts, and mutual promises to perform agreements ; and
- (e) all statements of a like kind.

Shall be omitted.—The insertion, therefore, of any of these formal statements will be an irregularity, and if embarrassment be caused thereby, an application may be made under s. 61 (*post*).

The bailment must still be stated, however, where it is material and traversable : *Ross v. Hill*, 2 C.B. 877.

59. (1) Either party may object by demurrer to the pleading of the opposite party on the ground that such pleading does not set forth sufficient ground of action, defence, or reply, as the case may be. Demurrer, &c
Ibid. s. 46.

(2) Where issue is joined in such demurrer the Court shall proceed and give judgment according as the very right of the cause and matter in law shall appear unto them, without regarding any imperfection, omission, defect in, or lack of form.

(3) No judgment shall be arrested, stayed, or reversed for any such imperfection, omission, defect in, or lack of form.

Pleading.—For a pleading to be good on demurrer under this section, it must be such as would have been good on general demurrer before this Act : *Richards v. Beavis*, 2 Com. Law Rep. 673.

As to practice on demurrer, see s. 100 (*post*) ; and RR. 162, 166.

Amendment has been allowed on the argument of a demurrer : *Jacobs v. Smith*, (1887) 8 N.S.W.R. 21 ; 3 W.N. 98, where the court laid down that where a purely technical point is taken, the court will allow an amendment to be made on demurrer.

C.L.P. Act,
S. 60.

No special
demurrer.

17 Vic. No. 21,
s. 47.

60. No pleading shall be deemed insufficient for any defect, which before the commencement of the Common Law Procedure Act of 1853 could only be objected to by special demurrer.

See as to special demurrer, Bullen and Leake's Precedents of Pleadings, 3rd ed., p. 819.

Pleadings
framed to em-
barrass may be
struck out or
amended.
Ibid. s. 48.

61. If any pleading is so framed as to prejudice, embarrass, or delay the fair trial of the action, the opposite party may apply to the Court or a Judge to strike out or amend such pleading, and the Court or Judge shall make such order respecting the same and also respecting the costs of the application as the Court or Judge thinks fit.

So framed, etc.—This section applies only to cases where there is something objectionable in the *framing* of the pleading: *Tooth v. Carey*, (1891) 12 N.S.W.R. 242; 8 W.N. 60. It cannot be applied to such a plea as "never indebted" pleaded to the common counts (*ibid*), but in other cases, see *Hunter River District Water Board v. Scottish Australian Mining Co.*, (1893) 10 W.N. 95. The power of the court under this section is limited to such pleadings as are at once embarrassing and irregular, informal or tricky, and contrary to the rules and practice of pleading: *Welland Railway Co. v. Blake*, (1861) 6 H. & N. 410.

But see *Reg. v. Saddler's Co.*, (1853) 22 L.J. Q.B. 451: "Even if a pleading be technically correct in form and also not open to a general demurrer, yet if it be unfair pleading, and of a sort to prevent or impede an equal trial of the merits, the statute has given to the court or a judge a discretionary power to amend or strike it out," *per Coleridge, J.* Note: The doubt in this case as to the application of the section to proceedings upon *mandamus* is removed by s. 175 of the present Act.

The opposite party may apply to the court or a judge to strike out or amend such pleading.—Applications to strike out or amend pleadings under this section have been granted in *Hancock v. Noyes*, 9 Ex. 388 (pleading matter of evidence); *Great Ship Co. v. Russell*, 3 F. & F. 94, where the word "fraudulently" was struck out of an allegation that defendant fraudulently broke a covenant: *Cottula v. Soames*, 3 F. & F. 93; *Brembridge v. Latimer*, 12 W.R. 878, a plea in an action for libel setting out and justifying the whole article: *Hoppe v. Single*, (1862) 2 S.C.R. 88, where in an action on a cheque, half of which had been lost, a judge's order had been obtained barring the defendant from setting up the loss of the cheque on plaintiff giving an indemnity, a demurrer on the ground of want of presentation was struck out as in contravention of the judge's order, although it was held that that order ought not to have been made: *Goode v. Onslow*, (1881) T.T.R. (2nd term) 15; *Mount Kembla Coal Co. v. Croaker*, (1884) 1 W.N. 61, action on a bill of exchange for non-acceptance, pleas of non-presentation for payment and no notice of dishonour, struck out: *Naughton v. McDonald*, (1884), 1 W.N. 67, action on a P.N., plea that it was made for the accommodation of a third person, no party to the note, struck out: *R. v. Powell*, (1885) 2 W.N. 9, two pleas to an information of intrusion struck out: *Hoffnung v. Fletcher*, (1887) 4 W.N. 68, unintelligible plea, struck out: *Borthwick v. Barrett*, (1888) 4 W.N. 155, double plea, struck out: *Took v. Coleman*, (1891) 7 W.N. 71, where in an action on a p.n. a plea of merger was struck out: *Finneran v. Eyre*, (1893) 9 W.N. 148, a false and frivolous plea struck out with leave to amend; *Petersen v. Waller*, (1894) 10 W.N. 115, pleas (to action on p.n.) of never indebted and no consideration, struck out. A plea to an action by a corporation that the attorney was not the attorney of the plaintiffs and that their name was wrongly used, struck out; *Broken Hill & Argenton Smelting Co. v. Foreman*, (1896) 13 W.N. 110; *Shelley v. Purcell*, (1899) 15 W.N. 180, a plea to three counts containing no answer to one of them was struck out. In *Ricketson v. Cook*, (1899) 15 W.N. 227, *Cohen, J.*, held that a plea is not so framed as to embarrass the plaintiff because it puts him to a large amount of expensive and needless proof; see *Welland Railway Company v. Blake*, 6 H. & N. 410; an attempt to strike out an equitable plea in an action by indorsees of a p.n. against indorsers was unsuccessful in *E.S. & A.C. Bank v. Wilde*, (1887) 3 W.N. 106.

Declarations have frequently been struck out. Where a declaration in libel set out the alleged libel at length, an application calling on the plaintiff to amend the declaration by showing more specifically what was complained of, or in the alternative to strike out the declaration was refused: *Buchanan v. Fairfax*, (1862) 1 S.C.R. 133. Where the declaration was for municipal rates and particulars showed that

both lighting and general rates were claimed, a motion to strike out or amend the declaration as embarrassing was refused: *Borough of Mosman v. Thompson*, (1896) 13 W.N. 43. In *Dibbs v. Daily Telegraph Co.*, (1888) 5 W.N. 26, application to strike out prefatory averments in the declaration relating to a previous action between the parties was refused. Amendment ordered in *Trotter v. Bennett*, (1881) T.T.R. 47. by specifying particular breaches; declaration struck out in *Oppenheimer v. Comptoir d'Escompte*, (1884) 1 W.N. 24. Where several causes of action were included in one count it was struck out: *Connolly v. Colonial Finance Corporation*, (1893) 9 W.N. 108. A declaration clearly disclosing no cause of action was struck out: *Bennett v. Cox*, (1894) 11 W.N. 71. Where a declaration was for substantially the same cause of action as a suit in Equity had been brought by plaintiffs, which suit had been dismissed and costs not paid, on summons to strike out the declaration the action was stayed till payment of the Equity costs: *Lucas v. Neild*, (1896) 13 W.N. 88; but on appeal the order was varied and the declaration struck out (*Ibid.*) 144. In *Clarke v. Darley*, (1898) 14 W.N. 129, a declaration was struck out as embarrassing being such as could not be pleaded to.

**G.L.P. Act,
S. 61.**

Demurrer.—A demurrer may be struck out as embarrassing: *Hoppe v. Single*, 2 S.C.R. 88; *Carruthers v. Harris*, (1902) 19 W.N. 25, where the only plea was to part only of the causes of action in the declaration, and issue was joined. Defendant demurred to this as there was a discontinuance, but the demurrer was struck out.

Apart from the statute the Court has an inherent jurisdiction to strike out pleadings which are an abuse of its process, and this power was frequently exercised before the passing of the Act. Where a plea is clearly bad, and the object is to perplex and delay rather than to set up a good ground of defence, the court will have no hesitation in setting it aside: *Balmanno v. Thompson*, (1839) 8 Dowl. 76.

A plea that is unquestionably bad, and contains no answer whatever to the action will be set aside as frivolous: *Bradbury v. Evans*, 5 M. & W. 595; *Knoules v. Barnard*, 10 A. & E. 19; 2 P. & D. 235; *Booth v. Gumley*, (1886) 3 W.N. 41; *Hudson Bros. v. Greta Collieries* (1894) 10 W.N. 120; following *Hill v. Scott*, (1892) 8 W.N. 98, where a plea was struck out as clearly demurrable, but it must be plain beyond all doubt that the pleading is bad: *Woods v. Wilson* (1902) 19 W.N. 147; *Horner v. Keppel*, 10 A. & E. 17; 2 P. & D. 234; explaining *Cowper v. Jones*, 4 Dowl. 591.

The court will not strike out a plea where there is any doubt as to its validity: *Dismore v. Gray*, (1892) 8 W.N. 99; 13 N.S.W.R. 59.

It has been said that a plea false on the face of it may be treated as a nullity, and the plaintiff may sign judgment as for want of a plea: *Vere v. Carden*, 5 Bing. 413, where to a declaration on two Bills of Exchange the defendant pleaded a judgment recovered in the term before the due date of the bills. But unless the inference of falsity is irresistible the plaintiff is not at liberty to take upon himself to pronounce the plea a nullity; the plea must be palpably a sham plea: *Bell v. Alexander*, 6 M. & S. 133.

The fact that a plea can be shown to be false is not of itself sufficient ground for striking it out. There are many cases in which the court has refused to set aside a plea on an affidavit of falsehood, even where the defendant is proved to have made admissions of the debt or other cause of action sued upon. To do so would be in effect requiring the defendant to verify his plea, and trying the case upon affidavit: *Le Forest v. Langan*, 4 Dowl. 642. See also *Merington v. Becket*, 2 B. & C. 81 (where the court refused to follow the case of *Richley v. Proone*, 1 B. & C. 286); *Milford v. Finden*, 8 M. & W. 511; *Walker v. Bailey*, (1884) 1 W.N. 71; *Tooth v. Carey*, (1891) 12 N.S.W.R. 242; 8 W.N. 60; *Lorenzen v. Bowden*, (1892) 8 W.N. 101; *Nickison v. Likely*, (1892) 13 N.S.W.R. 165; 8 W.N. 148; *Bubb v. Little*, (1893) 9 W.N. 193, where it was held that the court had no power to strike out a plea to a promissory note, though it was sworn by plaintiff and not denied by defendant that the plea was false and in contravention of an express agreement to pay the note: *Reid & others v. Taylor & another*, (1894) 10 W.N. 125; *A.J.S. Bank v. Alexander* (1894) 10 W.N. 143, where the judge refused to strike out a plea of "never indebted" as false, though the defendant in a former action between the same parties swore in his evidence that he was indebted in the amount sued for.

Such cases as *Hilder v. Mulcahy*, (1884) 1 W.N. 70; and *Hornsey v. Forster*, (1889) 5 W.N. 142, where pleas were struck out on an affidavit of falsity cannot be reconciled with the later decisions.

But the court will strike out a plea which is not only false, but also a sham plea and likely to cause embarrassment and to delay the trial: *Bartley v. Godslake*, (1818), 2 B. & Ald. 199; *Nutt v. Rush*, (1849) 4 Ex. 490; *Smith v. Hardy*, (1832) 8 Bing. 435; *Shadwell v. Berthoud*, (1822) 5 B. & Ald. 750; see *Tooth v. Carey*, (1891) 12 N.S.W.R. 242; 8 W.N. 60.

**C.L.P. Act,
S. 61.**

Court or judge.—The application is usually to a judge on summons, which may be signed by the chief clerk (R. 303, *post*), although leave has been given by a judge to plead several matters: *Proudfoot v. Commissioners for Railways*, (1893) 10 W.N. 80. The grounds of the application should appear in the summons: see *Schneider v. Scherf*, (No. 2), (1902) 19 W.N. 60; R.R. 306, 307 (*post*).

Pleadings how
entitled, dated
and entered on
record.

17 Vic. No. 21,
s. 49.

62. Every declaration and other pleading shall be entitled of the Supreme Court and of the day of the month and the year when the same was pleaded, and shall bear no other time or date, and every declaration and other pleading shall also be entered on the record under the date of the day of the month and year when the same respectively took place, and without reference to any other time or date, unless otherwise specially ordered by the Court or a Judge.

The pleadings should be entitled on the face; entitling them on the back is not sufficient; and if not properly entitled a pleading may be set aside as irregular: *Rippling v. Watts*, 4 Dowl. 290. So the date must be stated, and it must be stated to be "in the year of our Lord," mentioning the year: *Holland v. Tealde*, 8 Dowl. 320; otherwise it will be irregular. The want of a date: *Rippling v. Watts* (*supra*), or a date different from that of filing or delivering, will constitute an irregularity, amendable at the plaintiff's cost: *Hodson v. Pennell*, 4 M. & W. 373.

An added plea should bear the same date as the original pleas: *Short v. Simpson*, L.R. 1 C.P. 248, n., *per Willes*, J.

Profert and oyer
abolished.

Ibid. s. 50.

63. It shall not be necessary to make profert of any deed or other document mentioned or relied on in any pleading, and if profert is made it shall not entitle the opposite party to crave oyer of or set out upon oyer such deed or other document.

In an action by an executor who had not taken out probate, proceedings were stayed until it should be produced: *Webb v. Atkins*, 14 C.B. 401.

As to profert and oyer: see *Smith v. Yeomans*, 1 Wms. Saund. 317; and *Turquand v. Hennel*, 7 C.B. 179.

Setting out
documents
referred to in
pleading.

Ibid. s. 51.

64. A party pleading in answer to any pleading in which any document is mentioned or referred to shall be at liberty to set out the whole or such part thereof as may be material, and the matter so set out shall be deemed and taken to be part of the pleading in which it is set out.

Where to a declaration upon an award the defendant set out the award in his plea, and thereupon demurred to the declaration, the plea was held bad, as the award was to be taken as part of the plea: *Sim v. Edmands*, 15 C.B. 240; 23 L.J. C.P. 229; and better, 2 Com. Law Rep. 749.

Initials and
contractions.

5 Vic. No. 9,
s. 17.

65. In any action on a written instrument, where any party thereto is therein designated by any initial letter or letters or other contraction of the first or other name or names, it shall be sufficient to designate such party by such initial letter or letters or other contraction.

Performance of
conditions pre-
cedent may be
averred
generally.

17 Vic. No. 21,
s. 52.

66. The plaintiff or defendant in any action may aver performance of conditions precedent generally, and the opposite party shall not deny such averment generally, but shall specify in his pleading any condition precedent the performance of which he intends to contest.

In *Kelly v. Bradridge*, (1863) 2 S.C.R. 162, an action against architects for fraudulently withholding a certificate it was alleged in the declaration that all conditions were fulfilled to entitle the plaintiff to a certificate, but it was held on demurrer

to the declaration that "this section does not dispense with the necessity of a statement of the circumstances in such a case as this to show that the duty devolved upon the defendants." **C.L.P. Act, S. 66.**

A form of the averment of performance of conditions precedent generally is given in the Third Schedule, No. 21 (*post*), where the plaintiff states that "he did all things necessary on his part" to entitle him, &c; but the form in general use is that given in Bullen & Leake's Precedents, 3rd ed., p. 147.

The performance of a condition precedent must, formerly, not only have been stated specially, but ordinarily the time, place and manner of performance, and if there were several different Acts or things to be done, the performance of each must in this way have been stated: *Holdipp v. Otway*, 2 Wms. Saund. 107 b (3). Where performance could not be averred, it was necessary to show an excuse of non-performance. This section permits the performance of conditions precedent to be averred generally, but matter of excuse for non-performance should still be averred specially.

The above enactment is a return to the ancient system of pleading: *Thorpe v. Thorpe*, 1 Ld. Raym. 662; and see *Manby v. Cremonini*, 21 L.J. Ex. 288. The omission to aver, generally, performance of conditions precedent, may still form the subject of general demurrer. The principal cases decided upon this section are *Bentley v. Dawes*, 9 Exch. 666; *Greaves v. Legg* (*Ibid*) 715; *Fessard v. Mugnier*, 18 C.B., N.S. 286; 34 L.J. C.P. 126. The effect of it is well discussed in Bullen and Leake's Precedents, 3rd ed., pp. 147, 148, 563, 564.

Notwithstanding this section, when a defendant averred in his plea performance of conditions precedent generally, a general replication was held to be, by reason of s. 87 (*post*), a sufficient traverse by the plaintiff of the performance of any particular condition precedent on which he relies: *Tetley v. Wanless*, L.R. 2 Ex. 21, 25, *per Bramwell, B. Sed quare*.

67. The forms of pleadings contained in the Third Schedule to this Act shall be sufficient, and those and the like forms may be used with such modifications as may be necessary to meet the facts of the case, but nothing herein contained shall render it erroneous or irregular to depart from the letter of such forms so long as the substance is expressed without prolixity. **Forms of pleadings 17 Vic. No. 21, s. 84. Third Schedule**

See as to the construction of this section: *Place v. Potts*, 8 Exch. 705; *Wilkinson v. Sharland*, 10 Exch. 724; 11 Exch. 33; *Fagg v. Nudd*, 3 E. & B. 650; and *Hinton v. Duff*, 11 C.B., N.S. 724; 31 L.J. C.P. 199. See also *Fenton v. Ellis*, 6 Taunt. 192; *Brown v. Garnier*, 6 Taunt. 389; *Victors v. Davies*, 12 M. & W. 758; *Kelly v. Curzon*, 4 Ad. & E. 622; and *Berdoo v. Spittle*, 1 Exch. 175.

See as to new form of set-off: *Pearse v. Trenchard*, (1901) 18 W.N. 135.

68. The signature of counsel shall not be required to any pleading. **Signature of counsel. Ibid. s. 78.**

But see R. 38 (*post*).

Declaration.

69. A plaintiff shall be deemed out of Court unless he declares within one year after the writ of summons is returnable. **Plaintiff to declare within a year. Ibid. s. 53.**

R. 39 (*post*) gives defendant power to sign judgment of *non pros.* where declaration is not filed within 14 days from the last day limited for appearance (unless a judge allows further time).

In *Palmer v. Davis*, (1882) T.T.R. 91, an application to set aside a declaration on the ground that it was not filed within the time limited for doing so by this Rule was granted, but this decision was overruled: *Dobbie v. Hay*, (1896) 12 W.N. 115, where it was held that after the expiration of the time limited for declaring by the rule the plaintiff might still file his declaration at any time within one year, provided the defendant had not in the meantime signed judgment of *non pros.*

In *Gibson v. Bloomer*, (1890) 6 W.N. 114; 7 W.N. 21, it was held that where the declaration is filed after the time allowed by the rule has expired, the defendant cannot sign judgment of *non pros.*; but his proper procedure is to apply to set aside the declaration if irregular, and in *Euston v. Massey*, (1893) 9 W.N. 158, the Chief Justice decided that a declaration so filed was not irregular if filed within one year after the writ of summons was returnable as allowed by this section.

**C.L.P. Act,
S. 69.**

In *Newling v. Balmain New Ferry Co.*, (1895) 16 N.S.W.R. 225; 12 W.N. 29, the court held that the Rule (39) was not *ultra vires* of the section, and that, if the declaration be not filed within the time limited by the rule, the defendant may sign judgment of *non pros*.

"Out of Court" must be taken to mean as in case of non-suit. A writ having been issued in an action and appearance having been entered the plaintiff took no further steps in the action until two years afterwards, when he issued a second writ, it was held that he was not debarred from bringing the second action: *The Attorney General v. The London Guarantee and Accident Co., Ltd.*, (1894) 11 W.N. 87.

In *North v. Shierlaw*, (1897) 13 W.N. 163, the plaintiff after serving a writ out of the jurisdiction allowed six years to elapse without taking any step in the action, and then obtained leave from a judge to proceed. He proceeded without filing a declaration, and obtained judgment. It was held that such judgment was an irregularity and not a nullity, and on an application to set such judgment aside, held that the defendant, who did not apply to set it aside for nearly a year after it came to his knowledge, was too late in making the application.

After the writ of summons is returnable.—A writ of summons is returnable immediately on service being effected: *Baines v. Jackson*, 3 Dowl. 404; and the year here stated is not "four terms": *Chaplin v. Showler*, 18 L.J. Ex. 34. If a declaration is delivered after the expiration of one year from the service of the writ, it may be set aside at chambers as an irregularity: *Chaplin v. Showler* (*supra*). In actions removed from inferior courts by *certiorari*, &c., the plaintiff is not out of court until a year after the return of the writ by which the cause was removed: *Norrish v. Richards*, 3 Ad. & E. 733.

It seems very doubtful whether under the old rule of court, in England, which was similar in terms to the present, the year within which the plaintiff had to declare did not include periods during which his proceedings were stayed by order of the court, or by injunction: See *Horn v. Took*, 2 Dowl. 776; *Unite v. Humphrey*, 3 Dowl. 532; *Johns v. Sanders*, 5 D. & L. 49; but see *Ross v. Green* (old practice), 10 Exch. 891. The present statutory enactment is perhaps even less flexible.

This section cannot by reason of its very terms, apply in ejectment: *Scope v. Paddison*, 6 H. & N. 641; 30 L.J. Ex. 244.

See R. 125 (*post*); and *Metcalf v. Hetherington*, 3 H. & N. 755.

Forms of commencement &c., of declaration.
17 Vic. No. 21,
s. 54:

70. Every declaration shall commence in the Form No. 9 contained in the Second Schedule hereto, or to the like effect; and shall conclude in the Form No. 10 contained in the said Schedule, or to the like effect.

Form No. 9.—If this form is not followed, as by omitting the statement of whether the plaintiff sues in person or by attorney, the declaration will be irregular, and may be set aside or amended; and the application to do so ought to be made to a judge at chambers: *White v. Feltham*, 3 C.B. 658.

The declaration must be entitled of the court, and of the true date of pleading the same, s. 62 (*ante*).

The form shows that the venue must be mentioned; and that, by R. 115, must be either Sydney or some circuit town.

The Venue.—The old law as to the venue will be found in *Peacock v. Bell*, 1 Wms. Saund. 73; in the notes to *Mostyn v. Fabrigas*, Smith's L.C., 6th ed., vol. i., p. 623; and in Bullen and Leake's "Precedents of Pleadings," 3rd ed., pp. 2—4, which see also as to distinction between local and transitory actions. See also on venue: *Simmons v. Lillystone*, 8 Exch. 431.

For change of venue see notes to ss. 108 and 109 (*post*).

The declaration must correspond with the writ in, 1st, the names of the parties; 2nd, the number of the parties; 3rd, the character in which the plaintiff sues, or the defendant is sued. Objection when it does not do so, should be made within the time allowed for pleading: *Kitchen v. Roots*, 2 Dowl. 232.

Names of the parties.—1st. An incorrect statement of the name of the plaintiff in the declaration may be amended under s. 75 (*post*), at his cost, on the defendant's application, as the declaration is not on this ground irregular: *Lindsey v. Wells*, 3 N.C. 777.

If the plaintiff has been incorrectly named in the writ, he ought to be correctly named in the declaration, and a statement therein inserted that he sued by the wrong name. **C.L.P. Act, s. 70.**

If the defendant appears by the name in which he is sued, the plaintiff may declare against him in that name; if he appears by another name, the plaintiff ought to declare against him in that name, stating also the name by which he was sued in the writ.

If the defendant is misnamed, his remedy is under the s. 75 above referred to.

The application should be by summons at chambers, founded on affidavit of the correct name.

Number of the parties.—2nd. A declaration by one of two plaintiffs named in the writ would be irregular: *Rogers v. Jenkins*, 1 B. & P. 383; unless in the event of the death of the other, which should be suggested: s. 153, *post*. As to amending the writ and declaration by inserting or striking out the name of a plaintiff, see ss. 34, 35, 36 and 37, *ante*; adding, without an order, in the declaration a party not named in the writ would be an irregularity: *Haigh v. Conway*, 15 East. 1; *Rogers v. Jenkins*, *supra*; and *quare* as to amendment, *Baker v. Neaves*, 1 Dowl. 616, and *Goodchild v. Leadham*, 1 Exch. 707.

If the writ contains the names of several defendants, the plaintiff may declare against one: *Davies v. Thompson*, 14 M. & W. 161, 165; *Coldwell v. Blake*, 3 Dowl. 656; dropping all proceedings against the others; and running the risk of a plea in abatement where such plea may be pleaded, s. 42 (*ante*). If the writ is against two, and only one can be served, the plaintiff has a choice of proceeding against the one, or of keeping up his right of action against the other: s. 31, *ante*. Where a plaintiff declares against some only of several defendants who have appeared, he is liable, after notice to declare, to judgment of *non pros.* by a defendant against whom he has not declared: *Bancroft v. Greenwood*, 1 H. & C. 778; 32 L.J. Ex. 154.

Character of parties.—3rd. A plaintiff simply named in the writ may declare in a representative capacity. If he has described himself A. B., *executor, administrator or trustee*, he may declare for a cause of action in his own right; but if he describes himself as executor, or as administrator, or as trustee, he can only declare for causes of action accruing to him in such character. The cases are collected in a note to —, *Executors v. —*: 1 Dowl. 97, 98; and see *Christie v. Bell*, 16 M. & W. 169. See a case *Thorn v. Berriman*, 3 S.C.R. 124, *ante*, s. 4, note. Analogous rules hold with respect to defendants.

The declaration need not correspond with the writ in the amount claimed: *Tait v. Bligh*, (1900) 17 W.N. 145

71. In all cases in which, after a plea in abatement of the non-joinder of another person as defendant, the plaintiff without having proceeded to trial on an issue thereon commences another action against the defendant in the action in which such plea has been pleaded and the person named in such plea as joint contractor, or amends by adding the omitted defendant, the commencement of the declaration shall be in the Form No. 11 contained in the Second Schedule hereto, or to the like effect.

Commencement of declaration after plea of non-joinder.
17 Vic. No. 21, s. 55.

A plea in abatement of the non-joinder.—Upon a plea in abatement for non-joinder, the plaintiff may amend his writ, serve it on the added defendants: s. 42, *ante*; and declare *de novo*. If the plea is true in fact, he will have to pay costs: ss. 43 and 45. But plaintiff may enter a *cassetur breve*, and so avoid costs: s. 42, note, *ante*.

Form No. 11.—It is advisable to adhere to this form, as a departure from it may be irregular: *White v. Feltham*, 3 C.B. 658.

72. In actions of libel and slander the plaintiff may aver that the words or matter complained of were used in a defamatory sense, specifying such defamatory sense, without any prefatory averment to show how such words or matter were used in that sense, and such averment shall be put in issue by the denial of the alleged libel or slander, and where the words or matter set forth with or without the alleged meaning show a cause of action the declaration shall be sufficient.

Declaration for libel or slander.
Ibid. s. 56.

**G.L.P. Act,
S. 72.**

Without any prefatory averment.—In spite of this section in *Thurston v. Hatley*, (1871) 10 S.C.R. 173, a declaration that defendant falsely and maliciously spoke and published of the plaintiff the words "Did you hear the news about Mrs. T. (meaning the plaintiff), I was told she had a baby. It is now four days old" (meaning thereby that plaintiff had been recently delivered of an illegitimate child), was held bad on demurrer, as containing no averments to ground the innuendo; but in a case a few years later: *Somers v. Fairfax and another*, (1879) 2 S.C.R.N.S. 140; this first case was commented on. In *Somers v. Fairfax* the declaration alleged a publication by the defendants of a statement that G.W. had had to pay a large sum of money to the plaintiff on behalf of a son-in-law for whom the plaintiff had procured a Government situation. Innuendo, that the plaintiff had acted in a wrongful, improper, and discreditable manner, in procuring a government situation for a son-in-law of G.W., and in receiving payment for so doing. The declaration, which was demurred to on the grounds that the words were not defamatory, and that there were no averments to support the innuendo, was held good. See also *Westgarth v. Murnin*, (1873) 12 S.C.R. 1; and *Nicholls v. Australian Newspaper Co., Ltd.* (1896) 17 N.S.W.R. 27; 12 W.N. 77.

In *Dibbs v. The Daily Telegraph Co.*, (1888) 5 W.N. 26, the plaintiff had sued the defendants for libel and recovered a verdict for £100, in addition to 40/- paid into Court. This was another action for libel for a substantial repetition of the charges which had been the subject of the first, and the declaration set out as prefatory averments the declaration, proceedings, direction of the Judge, verdict, etc., in the former action. An application by the defendants to strike out the prefatory averments as being embarrassing was refused.

In *Buchanan v. Fairfax*, (1862) 1 S.C.R. 133, it was held that where a declaration in libel sets out the alleged libel at length, the plaintiff cannot be called upon to specify what parts he complains of as libellous, or to distinguish that which he complains of as effecting his private character from that which he complains of as effecting him in any public capacity.

The plaintiff may now set out the words without any *colloquium* and put on them any construction he pleases: *Hemmings v. Gasson*, E.B. & E. 346; 27 L.J. Q.B. 252. But where words are not actionable without special damage, (but as to this see the Defamation Act, 1901), such damage must be shown on the declaration: *Gallwey v. Marshall*, 9 Exch. 294; *Burns v. Mellor*, 9 W.N. 38; a case on slander of title. So the section does not relieve the plaintiff from showing in his declaration by proper *innuendoes* that words not in themselves actionable were used with a specific actionable meaning: *Cox v. Cooper*, 12 W.R. 75; but where the words are actionable *per se*, the effect of the section is, that the declaration shall be taken as if there were two counts, one with the *innuendo*, and the other without it: *Watkin v. Hall*, L.R. 3 Q. B. 396; see also *Brembridge v. Latimer*, 12 W.R. 878.

Pleas and subsequent pleadings.

Time for pleading where defendant is within jurisdiction.
17 Vic. No. 21,
s. 57.

73. Where the defendant is within the jurisdiction of the Court, the time for pleading in bar, unless extended by the Court or a Judge, shall be eight days, and a notice requiring the defendant to plead thereto in eight days, otherwise judgment, may, whether the declaration be delivered or filed, be indorsed upon the declaration or delivered separately.

But see as to this R. 51 (*post*); power to alter the times fixed by the Act is given by s. 268 (*post*).

A notice requiring the defendant to plead.—The want of notice to plead which is substituted for the old rule to plead, is an irregularity; and a judgment signed for want of a plea may be set aside. Yet where a declaration was indorsed "to plead in—" it was held that it should be understood to mean within the number of days allowed by the rules of the Court, and the Court refused to set aside a judgment signed in default of a plea: *Hifferman v. Langelles*, 2 B. & P. 363. A notice which gives less time than the defendant is entitled to would be irregular: *Maty v. Baldock*, Barnes 302. The defendant may waive an irregularity in the notice, as by taking out and serving a summons for time to plead: *Bolton v. Manning*, 5 Dowl. 769; see *Pearson v. Reynolds*, 4 East. 571; *Nias v. Spratley*, 4 B. & C. 386.

Pleas in abatement.—The section refers only to pleas in bar, so that pleas in abatement must still be pleaded within four days.

After amendment.—As to the time for pleading after amendment of the declaration, see s. 101. After an order for security for costs, with a stay of proceedings,

if the time has expired, the plaintiff (in the Common Pleas) could not sign judgment till the day after security is given : *Decker v. Thompson*, 3 B. & P. 319. If the time is unexpired, the defendant has the same time as remained unexpired when the summons for security was attendable, or the rule *nisi* for it served. **C.L.P. Act, S. 73.**

After particulars delivered.—By R. 52, a defendant is allowed the same time for pleading after the delivery of particulars under a judge's order, that he had at the return of the summons, unless otherwise provided for by the order. If a summons for particulars is taken out, the time for pleading runs on until it is returnable, when it ceases to run, until it is in due course disposed of. If particulars be ordered, the time for pleading ceases to run until these are delivered. If the summons is dismissed, the time forthwith runs on. In a summons for particulars, the defendant should at the same time, apply for "further time to plead," and get it made part of the order that that time be "after delivery of particulars." For the practice of the courts, see note to *Adams v. Drummond*, 1 Dowl. 99. If a summons is taken out for time to plead and is dismissed, the party has the remainder of the day on which it is dismissed to plead : *Mengens v. Perry*, 15 M. & W. 537 ; *Evans v. Senior*, 4 Exch. 818. A summons for time, or for particulars, should be made returnable before the time for pleading expires, or at least before judgment for want of a plea can be signed : *Glen v. Lewis*, 8 Exch. 132 ; 22 L. J. Ex. 24.

A defendant who has a days' time to plead after the happening of an event, has the whole of the day following that on which the event happens in which to plead : *Connolly v. Bremner*, L.R. 1 C. P. 557.

If the plaintiff gives the defendant more time to plead than he is entitled to, the defendant is entitled to the time so given : *Solomon v. Parker*, 2 Dowl. 405.

Extending time.—The terms usually imposed on the defendant where the time for pleading is extended are, that he shall "plead issuably, rejoin *gratis*, and take short notice of trial. See also R. 301 (*post*).

74. (1) Express colour shall not be necessary in any pleading.

(2) Special traverses shall not be necessary in any pleading.

(3) In a plea or subsequent pleading it shall not be necessary to use any allegation of *actionem non*, or *actionem ulterius non*, or to the like effect, or any prayer of judgment, nor shall it be necessary in any replication or subsequent pleading to use any allegation of *precludi non* or to the like effect, or any prayer of judgment.

Express colour special traverses formal commencements, and prayers of judgment unnecessary.
17 Vic. No. 21, ss. 58-60.

Express colour.—See Stephen on Pleading, 7th ed. p. 191 (*f*).

Prayer of judgment.—"It is apprehended that the provisions of this and the following sections as to the commencement and conclusion of pleas in general do not apply to pleas in abatement, and that the prayer of judgment heretofore used in the commencement of the plea is still necessary."—Chitty's Forms. p 474.

75. No plea in abatement for a misnomer shall be allowed in any action ; but the defendant may cause the declaration to be amended at the cost of the plaintiff upon a Judge's summons founded on an affidavit of the right name.

Misnomer not to be pleaded.
5 Vic. No. 9, s. 17:

At the cost of the plaintiff.—This refers to the amendment. The judge has discretion as to costs of summons to cause amendment to be made : *Longuet v. Holland* (1891) 8 W.N. 42 ; see also *Byrnes v. Allen and wife*, (1893) 9 W.N. 122, in which case a summons was taken out in chambers calling upon the plaintiff to show cause why the declaration should not be amended at the cost of the plaintiff by inserting the female defendant's name of Victoria Allen for the name of Alexandra Allen, by which she was called and misnamed therein. The Chief Justice allowed the amendment, but would not order the plaintiff to pay the costs, as it appeared to him to be an unnecessary application.

76. (1) No formal defence shall be required in a plea or avowry or cognizance, and it shall commence in the Form No. 12 contained in the Second Schedule hereto, or to the like effect.

Commencement of plea.
17 Vic. No. 21, s. 61.

**C.L.P. Act,
S. 76.**

(2) It shall not be necessary to state in a second or other plea or avowry or cognizance that it is pleaded by leave of the Court or a Judge, or according to the form of the statute, or to that effect; but every such plea, avowry, or cognizance shall be written in a separate paragraph and numbered, and shall commence in the Form No. 13 contained in the said Schedule, or to the like effect.

Formal conclusions unnecessary.

(3) No formal conclusion shall be necessary to any plea, avowry, cognizance, or subsequent pleading.

No formal defence, etc.—As to pleas in abatement, see note to s. 74 (*ante*).

A material variation from the prescribed form may afford ground for an application to set aside the plea: see s. 70, n. (*ante*). Thus the omission to state whether the defendant pleads in person, or by attorney, is irregular, and is a ground for setting aside the plea, or for an amendment at the defendant's cost. A plea pleaded in the name of a person who is not an attorney, is not, it seems, a nullity: *Hill v. Mills* 2 Dowl. 696. It might be set aside as irregular.

But the court will not set aside a plea as irregular on the ground of its having an informal commencement: *Bacon v. Ashton*, 5 Dowl. 94.

Where pleaded to part only of declaration.—If a plea be pleaded to one count only of a declaration, it ought to be so framed, otherwise it will be taken to be pleaded to the whole declaration: *Putney v. Swan*, 2 M. & W. 72. If a plea profess to answer the whole declaration, but the matter pleaded answer only a part, the plaintiff may demur, 1 Wms. Saund. 28 a (3); but see *Cummings v. Clifford*, 3 S.C.R. 185; and see *Edison v. Pigram*, 16 M. & W. 137; *Chappell v. Davidson*, 18 C.B. 194; or move to strike the plea out: *Shelley v. Purcell*, 15 W.N. 180 (*ante*) s. 61. If a plea began as an answer to a part, and contained in the body an answer to the whole, it might formerly have been demurred to specially: *Gray v. Pindar*, 2 B. & P. 427. Now the plaintiff may sign judgment to the part not answered in the beginning.

Plea of matter subsequent to action.

17 Vic. No. 21, s. 62.

77. Any defence arising after the commencement of any action shall be pleaded according to the fact without any formal commencement or conclusion, and any plea which does not state whether the defence therein set up arose before or after action shall be deemed to be a plea of matter arising before action.

Any defence arising after the commencement, etc.—See *Gresty v. Gibson*, L.R. 1 Ex. 112; *Brooks v. Jennings*, L.R. 1 C.P. 476.

Such a plea must afford a defence to the cause of action, and also to the claim for damages up to the time of pleading the plea, or it will be bad on demurrer: *Ash v. Pouppeville*, L.R. 3 Q.B. 86.

It may be observed that a plea of the defendant's bankruptcy must be pleaded as a defence arising after the commencement of the action, where the order of discharge is made after action, although the adjudication was before it: *Jones v. Hill*, L.R. 5 Q.B. 230.

A plea containing a defence arising after action may be pleaded together with pleas of defences arising before action, but the plaintiff may, by confessing such plea entitle himself to the costs of the cause up to the plea: R. 85 (*post*). A plea *puis darrein continuance* may be confessed by the plaintiff with similar result as to costs: R. 86 (*post*). The English rules on the subject, which are similar to ours, have been held to apply in the case of a confession of a plea of a plaintiff's conviction of felony: *Barnett v. London and N.W. Ry. Co.*, 5 H. & N. 604; 29 L.J., Ex. 334; see also *Plummer v. Hedge*, 24 L.J. Q.B. (Bail Court) 24; *Hill v. Howell*, 35 L.T. 130; *Cooke v. Hope-well*, 11 Exch. 555; *Morgan v. Harding*, 11 W.R. 65, and notes to following section.

Without any formal commencement or conclusion.—As to pleas in abatement see note to section 74 (*ante*).

Plea puis darrein continuance.

Ibid. s. 63;

78. (1) In cases in which, before the commencement of the Common Law Procedure Act of 1853, a plea *puis darrein continuance* was pleadable in Banco or at nisi prius, the same defence may be pleaded with an allegation that the matter arose after the last pleading, and such plea may when necessary be pleaded in vacation.

(2) No such plea shall be allowed unless accompanied by an affidavit that the matter thereof arose within eight days next before the pleading of such plea, or unless the Court or a Judge otherwise orders. **C.L.P. Act, S. 78.**

See RR. 85, 86.

Plea puis darrein continuance.—It would seem that this word "plea" includes all pleadings: *Newington v. Levy*, L.R. 6 C.P. 182, *per Blackburn, J.*

A plea *puis darrein continuance* may be pleaded at any time before verdict, even after the jury have retired to consider their verdict: *Pearson v. Parkins*, B.N.P. 310. There can be but one plea of this nature: B.N.P. 312. If pleaded after a demurrer it operates as a *retraxit* of the demurrer: *Stoner v. Gibbons*, Moore, 871; and *Solomon v. Graham*, 5 E. & B. 309.

By pleading this plea the defendant abandons all his former pleas: *Barber v. Palmer*, 1 Salk. 178. It may be pleaded if any issue remains to be tried, although on other issues the plaintiff has already obtained judgment: *Wagner v. Imbrie*, 6 Exch. 380.

If pleaded at *Nisi Prius*, it must be delivered to the judge, not to the attorney of the opposite party: *Payne v. Shenstone*, 4 D. & L. 396. And the judge has no discretion, if it is good in form and accompanied with a proper affidavit, but to receive it: *Ludlow, Corporation of v. Tyler*, 7 C. & P. 537. See a curious plea *puis darrein continuance* in *Todd v. Emly*, 9 M. & W. 606, in which case the judge dispensed with an affidavit.

If pleaded at *Nisi Prius*, it must be certified on the back of the record and returned to the court: *Townsend v. Smith*, 1 C. & K. 160, when the plaintiff may reply or demur as in other cases: *Ludlow, Corporation of v. Tyler* (*supra*). It cannot be replied to at *Nisi Prius*: *Pascall v. Horsley*, 3 Car. & P. 372.

If the plaintiff replies or demurs, the defendant, if successful, will not be entitled to costs incurred prior to the plea: *Littleton v. Cross*, 4 B. & C. 117.

The plea must be pleaded within eight days after the matter of defence has arisen unless the court or a judge otherwise orders. An order was made for leave thus to plead after the lapse of a considerable period; it being shown that the omission to plead within the time prescribed had not arisen from any culpable conduct on the part of the defendant, and had occasioned no disadvantage to the plaintiff: *Payne v. Shenstone* (*supra*); *Dunn v. Loftus*, 8 C.B. 76.

What may be thus pleaded.—A release from the plaintiff,—in an action by an administrator, that the letters of administration have been revoked,—the conviction of the plaintiff of felony: *Barnett v. L. and N.W. Ry. Co.*, 5 H. & N. 604; 29 L.J. Ex. 334,—the plaintiff having become an alien enemy through a declaration of war: *Alcinous v. Nigren*, 4 E. & B. 217,—are instances of cases in which this plea may be pleaded. Release should be pleaded; motion to strike the case out was refused on this ground: *Proudfoot v. Stubbins*, (1885) 2 W.N. 46. The plea of abatement by the coverture of the plaintiff is taken away, s. 159 (*post*).

As to the effect of the bankruptcy of the plaintiff or defendant, see Bankruptcy Act, 1898, s. 10 (7) and notes *Salisbury Bankruptcy Act*, p. 60.

A plea *puis darrein continuance* is in abatement or in bar, as in other cases.

If pleaded at *Nisi Prius* the plea ought to show that it is pleaded before the presiding judge.

Accompanied by an affidavit.—The plea must be accompanied by an affidavit unless the court or a judge otherwise orders, as in the case of *Todd v. Emly*, 9 M. & W. 606; and if the plea be pleaded at *Nisi Prius*, it must be sworn before the presiding judge: *Bartlett v. Leighton*, 3 C. & P. 408. When the affidavit referred to the plea thereunto annexed, but was not itself entitled in the cause, it was held sufficient in form: *Prince v. Nicholson*, 5 Taunt. 333.

See generally, Chit. Prac. 12 ed. vol. ii., pp. 919-923.

79. All matters which, before the commencement of the Common Law Procedure Act of 1857, were only the subject of a cross action, or might be made the subject of a cross action between the parties, shall by leave of a Judge, and on such terms as he thinks proper, be pleadable by way of set-off. Subjects of cross action may be pleaded. 20 Vic. No. 31, s. 17.

**C.L.P. Act,
S. 79.**

Cross action.—Plea of cross action is only allowed on consent order or summons to show cause: *R. 71*; even under the old rule it was held that a consent order would dispense with summons: *Carter v. Merewether*, (1898) 15 W.N. 96.

A plea of cross action must show that it arises out of the same transaction or matter as the matter pleaded to: *Zimmeler v. Manning*, (1863) 2 S.C.R. 235; *Head v. Cleary*, (1887) 3 W.N. 116; if pleaded to several counts, that it arises out of the same subject matter as each of the counts: *Dibbs v. Newcastle Coal and Copper Co.*, (1862), 1 S.C.R. 248. And see as to this plea, *per Faucett, J.*, *Jones v. Corker*, (1869) 8 S.C.R. 236; *Cobcroft v. Smart*, (1868) 8 S.C.R. 344, is an instance of a plea of cross action: see also *Meymott v. Piddington*, (1877) Knox 306.

A plea of cross action setting up a breach of contract by the plaintiff cannot be pleaded to a count in tort, though the tort alleged was connected with the same contract: *A.-G. v. McLeod*, (1893) 14 N.S.W.R. 121; 9 W.N. 159. And conversely on an action for breach of contract, defendant cannot plead a cross action claiming damages for fraudulent representation inducing him to enter into the contract: *Binnie v. Carlyon*, (1901) 18 W.N. 46; *s.p. Allpress v. Crawford*, (1900) 16 W.N. 154.

Plea of cross action allowed to action on a p.n.: *Hoare v. Dadley*, (1884) 1 W.N. 68. In *Cobban v. Styles*, (1891) 8 W.N. 3, terms were imposed; and see *Tooth v. Pitcher*, (1901) 18 W.N. 41.

By one defendant.—Two defendants being sued in contract, one of them pleaded by way of cross action that the contract was made with him alone and breach thereof; held, a good plea: *Spencer v. Bluett*, (1901) 18 W.N. 1.

When defendant in one action has commenced a second action, but pleads the same matter by way of cross action in the first action, the order for leave should direct what is to be done as to the second action: *Cummings v. Russell*, (1867) 6 S.C.R. 368; *Crane v. Macnamara*, (1897) 14 W.N. 38. Leave refused to plead matter which had already been the subject of an action by defendant; a verdict obtained by him having been set aside, and he having thereupon discontinued his action: *Lyons v. Love*, (1892) 8 W.N. 102.

Plea must be served.—A copy of the plea must be served with the summons: *Colonial Ammunition Co. v. Brunker*, (1898) 15 W.N. 117; *Porter v. Reynolds*, (1900) 17 W.N. 143.

**Payment into
Court.**

5 Vic. No. 9,
s. 22.
17 Vic. No. 21,
s. 64.
50 Vic. No. 26,
s. 2.

80. (1) In all actions (except actions for malicious arrest or prosecution, or debauching of the plaintiff's daughter or servant) the defendant, and by leave of the Court or a Judge, upon such terms as the Court or Judge thinks fit, one or more of several defendants, may pay into Court a sum of money by way of compensation or amends.

(2) Nothing in this section shall effect the provisions of any act whereby one or more of several defendants may make such payment into Court without such leave.

In the Common Law Procedure Act of 1853, s. 64, the exceptions included actions for libel and criminal conversation, but the defendant in an action for libel or slander may now pay money into court; and one or more of several defendants in such an action may do so without the leave required by this section: see the Defamation Act, 1901, s. 7; and *Dibbs v. The Daily Telegraph Newspaper Co.*, (1888) 9 N.S.W.R. 388; 5 W.N. 5. Actions for criminal conversation were abolished by 36 Vic. No. 9, s. 47, now the Matrimonial Causes Act, 1899, s. 92.

All actions.—The term "all actions" is sufficiently large to include detainee in which, however, the defendant usually applies to a judge to stay proceedings on his giving up the chattels, and paying nominal damages and costs; and if the plaintiff insists upon going on for substantial damages, it may be made part of the order that unless he recovers more than nominal damages, he shall pay the costs of the action; and terms may be put on both parties: *Phillips v. Howard*, 3 Dowl. 362. Analogous proceedings may be had in trover: *Peacock v. Nicholls*, 8 Dowl. 367. It was accordingly held, that payment into court might be made in respect of damages claimed: *Crossfield v. Such*, 8 Exch. 159; but it could not be made so as to defeat the plaintiff's claim for a return of his goods under the C.L.P.A., 1854, s. 78; s. 136 (*post*); *Allan v. Dunn*, 26 L.J. Ex. 185. If, therefore, in detainee, the plaintiff proceeded only for damages for the detention, this plea was applicable; otherwise not. These words also include trover, in which payment into court could not formerly be pleaded: *Key v. Thimblebey*, 6 Exch. 692.

In respect of one of several counts.—The defendant may pay money into court in respect of one or more of several counts : *Fulwell v. Hall*, 2 W. Bl. 837; *Hallett v. E. India Co.*, 2 Burr. 1120. So he may in respect of all the counts, and it is not necessary to specify how much is paid to one count, how much to another : *Marshall v. Whiteside*, 4 Dowl. 766, except there are counts on a bill or note, when the plea must specify how much of the money paid in applies to the bill or note : *Jourdain v. Johnson*, 2 C.M. & R. 564, and *Tattersall v. Parkinson*, 16 M. & W. 752. So he may in respect of a part of a count, s. 81 (*post*).

**C.L.P. Act,
S. 80.**

The defendant . . . may pay money into court.—The effect of a plea of payment into court is to admit a cause of action, and that damages to the amount paid in have been sustained by the plaintiff. See on this point Bullen & Leake, p. 666.

Payment of money into court in satisfaction of damages may be made by one tenant in common, in an action in trespass brought by his co-tenant for destruction of the common property : *Cresswell v. Hedges*, 1 H. & C. 421; 31 L.J. Ex. 497.

Particulars of intended appropriation were ordered by the Court of Exchequer, *Bramwell, B., dubitante*, in *Baxendale v. Gt. W. Ry. Co.*, 6 H. & N. 95; 30 L.J. Ex. 63; but in a later case, *Thames Iron Works, &c. Co. v. R. Mail S. Packet Co.*, 10 C.B., N.S. 375; 30 L.J. C.P. 265, they were refused by the Court of Common Pleas, and the former case distinguished, if not disapproved.

No other defence permitted.—The defendant will not be allowed to plead any other defence to that part of the declaration to which the plea of payment into court applies : *Thomson v. Jackson*, 8 Dowl. 591; *Hurt v. Denny*, 1 H. & N. 609; *Dibbs v. Daily Telegraph*, 9 N.S.W.R. 388; 5 W.N. 5. He must plead the plea of payment into court, if it is to a part of the declaration, to such part only, s. 81 (*post*).

Subject to the exceptions in the statute and to the above observations, the defendant may pay money into court in all actions. The exception does not extend to an action for assault and battery of the plaintiff's servant. The exceptive clause "means actions where the injury to the plaintiff is the subject of the action. When the assault is upon some member of the plaintiff's family, or person in his service, the gist of the action is the loss sustained, and the case is not within the exception" : *Newton v. Holford*, 2 D. & L. 554, affirm. in Ex. Ch. (*Ibid.*) 556, n. The exception would not apply to an action for the enticing away of the plaintiff's daughter or servant: see *Evans v. Walton*, L.R. 2 C.P. 615.

Amount to be paid.—*Amendment of plea.*—The sum to be paid into court ought to be the amount claimed, and, in the case of a debt, with interest down to the day of payment into court : *Kidd v. Walker*, 1 Dowl. 331. A plea of payment into court may be amended, and a further sum allowed to be paid in on application to a judge : *Domett v. Young*, Car. & Mar. 465. In one case, where money has been paid into court, and the plaintiff had replied accepting the money and taking it out of court, in mistake of the effect of his so doing, he was allowed to withdraw his replication and repay the money to the defendant, with liberty to the defendant to plead *de novo* : *Webster v. Emery*, 10 Exch. 901; 24 L.J. Ex. 186, Ex. Ch. Compare *Cannon v. Reynolds*, 5 E. & B. 301; 26 L.J. Q.B. 62, cited in note to s. 260 (*post*).

The special plea of apology and payment given by the Defamation Act, 1901, s. 8, cannot be pleaded with not guilty to the same part of the declaration : *O'Brien v. Clement*, 15 M. & W. 435. See upon this plea : *Lafone v. Smith*, 3 H. & N. 735; 28 L.J. Ex. 33; and 4 H. & N. 158; and *Hutchinson v. Australian Newspaper Co.*, (1899) 20 N.S.W.R. 184; 15 W.N. 317.

The defendant pleaded an apology, and payed £5 into court under this statute, and the plaintiff by his replication admitted the payment into court, and took issue on the residue of the plea; the jury found a verdict for the plaintiff, damages 20s.; it was held that the plea not having been proved must not be taken as containing any admission of liability, and that the jury were rightly directed to consider the question of damages independently of the amount paid into court : *Jones v. Mackie*, L.R. 3 Ex. 1.

One or more of several defendants may, etc.—One of several defendants may, by leave of the court or a judge, pay money into court. It had not been the practice to allow this; the case below mentioned of two actions being brought against co-contractors is different from the case of co-defendants : see *Kay v. Panchiman and others*, 2 W. Bl. 1029.

Where two actions were brought for the same cause of action against two co-contractors, and in one of them the defendant had paid £300 into court, *Alderson, B.*, allowed the other defendant to plead payment into court of that sum, without his actually paying it in : *Rendall v. Mallison*, 16 M. & W. 828.

**C.L.P. Act,
S. 80.**

Provisions of any act.—As to the proviso, see *e.g.*, the Defamation Act, s. 7.
Costs.—See s. 83, RR. 89, 90 (*post*).

Where goods of the plaintiffs had been improperly seized and sold by defendant, plaintiffs sued in one count for the wrong, and in a second count for money received; money was paid into court on the second count and accepted by the defendants, *held*, that they had to that extent waived the tort: *Smith & another v. Ogg*, (1862) 3 S.C.R. 6; *Sempill v. Vindin*, (1868) 7 S.C.R. 391; but *Smith v. Ogg* was commented on and doubted in *Mase v. A.S.N. Co.*, (1868) 8 S.C.R. 84.

In *Langdon v. Pearce*, (1900) 20 N.S.W.R. 431; 16 W.N. 66; in an action by an attorney on a bill of costs for £59, the defendant paid £32 into court as sufficient to satisfy so much of the claim, and as to the remainder pleaded: 1. never indebted; 2. that no bill had been delivered within a month before action; *semble*, that the plaintiff was not at liberty to take the £32 out of court in full satisfaction, enter a *nolle prosequi* as to the causes of action to which the other pleas related, and afterwards sue for the balance of his account in the District Court: *sed q.*

Payment into
Court, how
pleaded.

17 Vic. No. 21,
s. 65.

81. When money is paid into Court, such payment shall be pleaded in all cases as near as may be, *mutatis mutandis*, in the Form No. 14 contained in the Second Schedule hereto.

The words "*as near as may be*" only authorise such alterations as may be necessary in order to adapt the plea to the names of the parties, to the form of action, to the sum paid, and the like: *Aston v. Perkes*, 15 M. & W. 385.

The word "*claim*" in the Form covers a demand of any nature.

Justices and others paying money into court under particular statutes need not state in the plea the character in which they make the payment: *Aston v. Perkes* (*supra*), where many statutes are referred to; *Key v. Thimblebey*, 6 Exch. 692; *Thompson v. Sheppard*, 4 E. & B. 53. The form of the plea given in the foregoing section should be adhered to, and the character or special circumstances of the payment should not be set out: *Thompson v. Sheppard* (*supra*).

No order to pay
money into
Court:

Ibid. s. 66.

82. (1) No rule or Judge's order to pay money into Court shall be necessary except where leave is required in the case of one or more of several defendants; but the money shall be paid to the proper officer of the Court, who shall give a receipt for the amount in the margin of the plea.

Payment out.

Ibid.

(2) The said sum shall be paid out to the plaintiff, or to his attorney upon a written authority from the plaintiff, on demand.

Pay money into court.—As to payment into court by one or more of several defendants, see s. 80 (*ante*) and notes.

The proper officer . . . who shall give a receipt.—The defendant should take care to have the officer's receipt on the margin of the plea, as the omission may afford ground for application to set aside the plea for irregularity: *Harson v. Busk*, Har. Dig. 7358.

The said sum shall be paid out to the plaintiff.—Taking the money out of court is a waiver of any irregularity in paying it in: *Griffiths v. Williams*, 1 T.R. 710.

If the plaintiff dies, the money will be paid out only to his legal representative; *Palmer v. Reippenstein*, 1 M. & G. 94.

Or to his attorney upon a written authority from the plaintiff.—A written authority from the plaintiff to his attorney is required before the latter can get the money out of court; but no affidavit to verify such authority is ordinarily required: R. 92 (*post*). See as to costs, RR. 89, 90 (*post*), and *Harold v. Smith*, 5 H. & N. 381; 29 L.J. Ex. 141.

Proceedings by
plaintiff after
payment into
Court.

Ibid. s. 67.

83. After the delivery of a plea of payment of money into Court—

(a) the plaintiff may reply to the same by accepting the sum so paid into Court in full satisfaction and discharge of the cause of action in respect of which it has been paid

in, and may in that case tax his costs of suit, and in case **C.L.P. Act, S. 83.** of non-payment thereof within forty-eight hours sign judgment for his costs of suit so taxed; or

- (b) the plaintiff may reply that the sum paid into Court is not enough to satisfy the claim of the plaintiff in respect of the matter to which the plea is pleaded, and in the event of an issue thereon being found for the defendant, the defendant shall be entitled to judgment and his costs of suit from the time of such plea.

The plaintiff may reply by accepting.—If the plaintiff determines on accepting the sum paid into court in satisfaction of the action, he may reply that he accepts the sum paid into court in satisfaction of that part of the declaration to which the plea is pleaded. If he does so, he must at the same time add a *nolle prosequi* as to the residue, otherwise the defendant may sign judgment of *non pros.*: *Emmett v. Standen*, 6 Dowl. 591; see *Langdon v. Pearce*, (1900) 20 N.S.W.R. 431; 16 W.N. 66, cited in note to section 80 (*ante*).

Upon this, the plaintiff may proceed to tax his costs, and sign final judgment if the same are not paid within forty-eight hours after taxation: *Rumbelow v. Whalley*, 16 Q.B. 397; 20 L.J. Q.B. 262. The defendant will be entitled to the costs of that part of the declaration and plea or pleas to which the *nolle pros.* is entered: *Coodee v. Goldsmith*, 5 Dowl. 288.

If, although he accepts the money paid into court in satisfaction of the causes of action to which it is pleaded, he yet determines to proceed with the action for the remaining causes of action, then, instead of entering a *nolle pros.*, he must reply to the other pleas of the defendant, and in this case he will not be entitled to tax his costs *Cauty v. Gill*, 4 M. & G. 907, until the determination of the action; when he will be entitled in any event to the costs in respect of the claims so satisfied: RR. 89, 90 (*post*); see *Woolfe v. Bourke*, (1865) 4 S.C.R. 29.

Where in an action for work and labour, after issue joined, part of the money claimed was paid into court, but, the plaintiff continued the action for the residue, and failed at the trial, it was held that he was not entitled to the costs of the brief: *Harold v. Smith*, 5 H. & N. 381; 29 L.J. Ex. 141.

84. Whereas certain causes of action may be considered to partake of the character both of breaches of contract and of wrongs, and doubts may arise as to the form of pleas in such actions, and it is expedient to preclude such doubts: Any plea which is good in substance shall not be objectionable on the ground of its treating the declaration either as framed for a breach of contract or for a wrong.

Pleas to actions partaking both of breach of contract and wrong.
17 Vic. No. 21, s. 68.

85. Pleas of payment and set-off, and all other pleadings capable of being construed distributively, shall be taken distributively, and if issue is taken thereon and so much thereof as is sufficient answer to part of the causes of action proved is found true by the jury, a verdict shall pass for the defendant in respect of so much of the causes of action as is answered, and for the plaintiff in respect of so much of the causes of action as is not so answered.

Payment set-off and other pleadings to be construed distributively.
Ibid. s. 69.

The old law was that to have entitled a defendant to a verdict on a plea of payment of a sum certain, he must have proved payment of the whole sum: *Cousins v. Paddon*, 2 C.M. & R. 547. So, on a plea of set-off, the plaintiff was entitled to a verdict, unless the defendant proved a set-off, equalling the whole of the plaintiff's aggregate demand. The plea of set-off was not divisible: *Moore v. Butlin*, 7 Ad. & E. 595; but it was available (if it did not meet the whole demand) in reduction of damages: *Tuck v. Tuck*, 5 M. & W. 109; *Rogers v. Maw*, 15 M. & W. 444.

Pleadings.—"Pleadings" here mean pleadings generally, and includes declarations; and the enactment applies to pleadings in all actions. See instances of verdicts entered, under the old practice, distributively in trespass, where a right of way was pleaded: *Knight v. Woore*, 5 Dowl. 201; in trespass *qu. cl. fr.*: *Phythian v. White*, 1 M. & W. 216; in case: *Giles v. Groves*, 12 Q.B. 721.

**C.L.P. Act,
S. 88.**

The effect of this enactment is that pleas of payment and set off, and all other pleadings capable of being construed distributively are so construed; and the costs of the defendant on the part of the issue on which he succeeds are set-off against or deducted from the costs of the plaintiff in maintaining the part found for him. See *Treherne v. Gardner*, 8 E. & B. 161; and *Reynolds v. Harris*, 3 C.B., N.S. 267; 28 L.J. C.P. 26, in which latter *Biddulph v. Chamberlayne*, 17 Q.B. 351, is impeached; also *Davis v. Thomas*, 5 Jur., N.S. 709; *Wilson v. McBean*, (1868) 7 S.C.R. 103; *Kearney v. Bryan*, (1871) 10 S.C.R. 167; *Brown & another v. Dibbs*, (1873) 12 S.C.R. 339; *Dubbo Refrigerating Co. v. Rutherford*, (1898) 14 W.N. 180; *Little v. Sandeman*, (1880) 1 N.S.W.R. 263, s. 265 (*post*).

It has been held: *Wilkinson v. Kirby*, 15 C.B. 439, that this section does not render a plea of "not possessed," to an action of trespass for mesne profits, distributable; and it has also been held: *Gabriel v. Dresser*, 15 C.B. 622, that part performance of an agreement, by way of accord and satisfaction of a whole cause of action, could not be pleaded distributively; see upon this *Blagrove v. Bristol Waterworks Co.*, 1 H. & N. 369; and *Cooper v. Parker*, 15 C.B. 822; but see also *Stears v. S. Essex Gaslight and Coke Co.*, 9 C.B., N.S. 180; 30 L.J. C.P. 49. On the other hand, a plea of "not possessed" in trover has been held distributable: *Freshney v. Wells*, 26 L.J. Ex. 228. The general issue "never indebted" has been held distributable: *Treherne v. Gardner* (*supra*); see also *Chappell v. Davidson*, 18 C.B. 194; with *Blagrove v. Bristol Waterworks Co.* (*supra*); also *Lynne v. Siesfield*, 1 H. & N. 278; *Parr v. Jewell*, 16 C.B. 684; and *Bennett v. Thompson*, 4 W.R. 594. Where upon an insurance of goods, part only of the goods is lost by perils of the sea, the issue upon a plea denying the loss is distributable: *Paterson v. Harrison*, 2 B. & S. 814; 31 L.J. Q.B. 277; in which case *Anderson v. Chapman*, 5 M. & W. 483, is discussed and distinguished, if not disapproved; see also sections 90 and 268 (*post*). And see Bullen & Leake, 3rd ed., p. 438.

A plea to three counts severally and respectively is well pleaded to each of them as being distributive: *Morris v. Bank of New South Wales*, (1862) 1 S.C.R. 65. And even though not expressly pleaded severally and respectively: *Cummings v. Clifford* (1864) 3 S.C.R. 185. On demurrer such a plea would be sustained so far as it is an answer to some counts; *Gordon v. Bowman*, (1865) 5 S.C.R. 28. Particulars must be given under pleas of payment and set-off: R. 74 (*post*).

Traverse of the
declaration.
17 Vic. No. 21,
s. 70.

86. A defendant may either traverse generally such of the facts contained in the declaration as might have been denied by one plea, or may select and traverse separately any material allegation in the declaration although it might have been included in a general traverse.

Traverses should be only of material allegations: *Perry v. Jones*, (1862) 1 S.C.R. 73; *Carter v. Kenyon*, (1863) 2 S.C.R. 222.

And a defendant ought not to traverse vexatiously every allegation open to a traverse. See observations of Lord Campbell in *Cooling v. Gt. N. Ry. Co.*, 12 Q.B. 485; and *S.E. Ry. Co. v. Hebblewhite*, 12 Ad. & E. 497.

See Bullen & Leake, 3rd ed., p. 435 and chapters V. and VI. under the head of "General issue," and RR. 64, *et seq.* (*post*).

Traverse of plea
or subsequent
pleading.
Ibid.: ss. 71, 72.

87. (1) A plaintiff may traverse the whole of any plea or subsequent pleading of the defendant by a general denial, or admitting some part or parts thereof deny all the rest, or deny any one or more allegations.

(2) A defendant may in like manner deny the whole or part of a replication or subsequent pleading of the plaintiff.

The plaintiff may join issue, 1st, generally, under s. 88 (*post*); or, 2ndly, admitting part of a plea, deny the rest (as for instance, now that the plea of set-off is distributive, s. 85, *ante*, instead of taking issue, plead the Statute of Limitations to one part, and deny the rest); or 3rdly, traverse any one or more of the allegations of the plea. But this section does not dispense with a new assignment where it would previously have been necessary: *Glover v. Dixon*, 9 Exch. 157; *Huddart v. Rigby*, L.R. 5 Q.B. 139, Ex. Ch. *Quære*, whether this and the two following sections apply to a traverse by a plaintiff in reply: see *Trent v. Hunt*, 9 Exch. 14.

And see references to Bullen & Leake given in notes to the preceding section.

88. (1) Either party may plead in answer to the plea or subsequent pleading of his adversary that he joins issue thereon, which joinder of issue may be in the Form No. 15 contained in the Second Schedule hereto, or to the like effect.

**C.L.P. Act,
S. 88.**
Joinder of issue.
17 Vic. No. 21,
s. 73.

(2) Such form or joinder of issue shall be deemed to be a denial of the substance of the plea or other subsequent pleading and an issue thereon.

(3) In all cases where the plaintiff's pleading is in denial of the pleading of the defendant or some part of it, the plaintiff may add a joinder of issue for the defendant.

Join issue.—See RR. 64, *et seq.* (post).

See s. 87 (ante).

If the defendant does not plead within due time, the plaintiff's course is to sign judgment: *Twycross v. King*, 6 Q.B. 663; after the time for pleading has expired the defendant will not be let in to plead without the consent of the plaintiff or leave of a judge: R. 56 (post).

Plaintiff may add a joinder.—But now by R. 57 where either party fails to join issue, his adversary may sign judgment of *non pros.* or *nil dicit*; see that Rule and cases there mentioned.

In *Douling & another v. Riley*, (1900) 16 W.N. 243, to a declaration on common counts, the defendant pleaded the general issue, and a special plea. The plaintiff joined issue on both pleas and filed replications to the second plea. The defendant having failed to rejoin, the plaintiffs signed judgment on the whole record. *Held*, the judgment must be set aside as there were issues for trial under the joinder of issues on the two pleas.

89. (1) Either party may by leave of the Court or a Judge plead and demur to the same pleading at the same time, upon an affidavit by such party or his attorney if required by the Court or Judge to the effect that he is advised and believes that he has just ground to traverse the several matters proposed to be traversed by him, that the several matters sought to be pleaded as aforesaid by way of confession and avoidance are respectively true in substance and in fact, and that he is further advised and believes that the objections raised by such demurrer are good and valid objections in law.

Pleading and
demurring
together.
Ibid: s. 74:

(2) It shall be in the discretion of the Court or a Judge to direct which issue shall be first disposed of.

By leave of the court or a judge.—It is discretionary in the court or a judge to allow a party to plead and demur together, although an affidavit is made as required by the above section: *Thompson v. Knowles*, 24 L.J. Ex. 43.

Plead and demur.—If issues in fact are raised, it is not advisable for a plaintiff to demur, where he can with safety avoid it, as he would thereby delay the final judgment and the recovery of his demand.

It shall be in the discretion of the court, etc.—The direction as to which issue shall be first disposed of should be part of the order. It still continues the privilege of the plaintiff, subject to the direction of the court, to select which issue shall be first decided: *Crucknell v. Trueman*, 9 M. & W. 684. Where a defendant had pleaded and demurred, and the demurrer had been determined against him, an application by him to the Court of Queen's Bench to allow the trial of the issues of fact to stand over until after the demurrer was finally disposed of in the court of error was refused, the court being of opinion that this section did not allow error to be brought before the record was complete, but that it applied only to the disposing of the issue by the court in which it is first raised, and the judgment on the demurrer had disposed of the issue in law finally as regarded that court: *Lumley v. Gye*, 2 E. & B. 216; 22 L.J. Q.B. 463.

In cases where the demurrer goes to the whole cause of action, the demurrer should be first argued; but that this may be done, the defendant should, it would appear, have the consent of the plaintiff, or a judge's order.

**C.L.P. Act,
S. 89.**

Leave to plead and demur may be granted *ex parte*: R. 60 (*post*).

It is questionable whether this and the following sections apply to *replevin*; the cases upon this doubtful matter are collected in *Marshall v. Bishop of Exeter*, 28 L.J., C.P. 300; 7 C.B., N.S. 653; see also *Reg. v. Scale*, 5 E. & B. 1.

See Bullen & Leake, 3rd ed., 821.

Several matters
may be pleaded
at any stage of
the pleadings.

17 Vic. No. 21,
s. 75.

90. By leave of the Court or a Judge—

(a) the plaintiff may plead in answer to the plea or the subsequent pleading of the defendant as many several matters as he thinks necessary to sustain his action; and

(b) the defendant may plead in answer to the declaration or other subsequent pleading of the plaintiff as many several matters as he thinks necessary for his defence,

upon an affidavit of the party making such application or his attorney, if required by the Court or Judge, to the effect that he is advised and believes that he has just grounds to traverse the several matters proposed to be traversed by him, and that the several matters sought to be pleaded as aforesaid by way of confession and avoidance are respectively true in substance and in fact.

By leave of the court or a judge.—The plaintiff in order to reply, or the defendant in order to plead several distinct matters in reply to the same plea or in answer to the same cause of action, always requires a judge's order (except in the case of the pleas referred to in s. 92, *infra*) which order may be made *ex parte*, R. 60, and usually is so. The order gives leave to plead pleas according to an abstract accompanying it, and the pleas should correspond with the abstract, or judgment may be signed: see (*infra*). But where leave was given to plead, 1, non assumpsit; and, 2, equitable plea, plaintiff signed judgment, and on summons to set aside the judgment argued that the leave was too wide, as the kind of equitable plea ought to have been specified; but it was held that as the pleas filed came within the order plaintiff ought not have signed judgment, but should have appealed against the order: *Schneider v. Scherf* (No. 2), 1902, 19 W.N. 60. The abstract should properly show the matters to be pleaded (*ibid.*): see *Murray v. Thompson*, (1860) 6 S.C.R. 89, for a motion to rescind an order.

The pleas are still subject to be struck out on proper grounds as embarrassing without motion to rescind the order, on summons for that purpose: *Proudfoot v. Commissioner for Railways*, (1893) 10 W.N. 80. And see *A.-G. v. McLeod*, (1893) 14 N.S.W.R. 121; 9 W.N. 159.

If a judge in chambers refuses to make an order, the party seeking leave to plead several matters may apply to the court: *Johnstone v. Knowles*, 1 Dowl. N.S. 30; *Griffith v. Selby*, 9 Exch. 393; *Chitty's Archbold*, 286.

The pleas which may be pleaded by the defendant, without leave, are enumerated in s. 92 (*post*). Leave for the plaintiff to reply, or for the defendant to plead several matters, is not necessary, where the pleas taken altogether constitute but one answer to the preceding pleading: *Archer v. Garrard*, 6 Dowl. 132.

The 4 & 5 Anne, c. 16, s. 4, did not bind the crown: *Att.-Gen. v. Donaldson*, 9 Dowl. 319; neither do the words of this section; see *Tobin v. The Queen*, 14 C.B., N.S. 505; 32 L.J. C.P. 216.

When leave to plead several matters may be refused.—Leave will be refused to plead pleas grossly inconsistent with each other: *Thomson v. Jackson*, 9 Dowl. 591, or vexatiously inconsistent: *Steel v. Sturry*, 3 Dowl. 133; *Cooling v. Gt. N. Ry. Co.*, 15 Q.B. 485; though pleas merely inconsistent are not objectionable: *Wilkinson v. Small*, 3 Dowl. 564. A plea that is absurd will be disallowed: *Goodman v. Morrell*, 1 Dowl. N.S. 383; so will one that tenders an immaterial issue: *Murray v. Bomber*, 6 Dowl. 537; or one that is clearly bad: *Lafond v. Ruddock* [rejoinder], 13 C.B. 813; 22 L.J., C.P. 217; *Walsh v. O'Connor & others*, (1893) 9 W.N. 149; *Capner v. Mincher*, 13 M. & W. 704; or one that is fraudulent, as a release by a co-plaintiff who has no real interest in the action: *Lascaridi v. Gurney*, 3 F. & F. 101, *per Williams, J.*; or pleas that only raise a point a second time upon the same pleadings: *Jenkins v. Creech*, 5 Dowl. 293; *Dawson v. M'Donald*, 2 M. & W. 26; or one that is not a sub-

stantial plea to the action : *S.E. Ry. Co. v. Hebblewhite*, 12 Ad. & E. 497 ; and *Needham v. Law*, 1 Dowl., N.S. 1027, where a traverse of the defendant's being a public registered officer of a company was not allowed to be pleaded with pleas to the merits. But as to this last case, see *Roe v. Fuller*, 7 Exch. 220 ; 20 L.J., Ex. 104. See generally upon this subject, Chit. Prac. 12 ed., vol. i., pp. 279—289, where numerous cases of pleas allowed and disallowed are collected.

**C.L.P. Act
S. 90.**

When the pleas delivered do not substantially correspond with those for which leave has been given, the plaintiff may sign judgment : *Hills v. Haymen*, 2 Exch. 323 ; *Bailey v. Baker*, 9 M. & W. 769 ; *Gabardi v. Harmer*, 3 Exch. 239 ; *Harvey v. Hamilton*, 4 Exch. 43 ; *Wills v. Robinson*, 5 Exch. 302 ; and s. 92 (2) (post) ; but the defendant may ordinarily abandon any of the pleas that he has obtained leave to plead. Where the defendant is under terms to plead issuably, the plaintiff may also sign judgment, if a plea, though allowed by a judge, is not issuable : *Capner v. Mincher*, 13 M. & W. 704.

As to costs, see *Bentley v. Dawes*, 10 Exch. 347 ; 23 L.J., Ex. 280 ; *Abley v. Dale*, 11 C.B. 889 ; and *Dunston v. Paterson*, 5 C.B., N.S. 279.

See s. 92 (*infra*), and s. 94 (*post*) as to new assignments and pleas to them.

On a rule to enter a nonsuit pursuant to leave reserved, the court ordered a verdict to be entered for the defendant on one issue, without disturbing the verdict found for the plaintiff on another, as that course seemed most consistent with doing justice between the parties : *Winterbottom v. Derby*, Lord, L.R. 2 Ex. 316.

Upon an affidavit.—The affidavit, if made by the party, should state that he is advised and believes ; if by the attorney, it should state that he is informed or instructed and is advised and believes : *Roubotham v. Dupree*, 1 Dowl. 537 ; *Schofield v. Huggins*, 3 Dowl. 427.

See as to sufficiency of affidavit, *Platt v. Elce*, 8 Exch. 364, explaining *Lumley v. Gye*, 22 L.J. Ex. 9.

On the subject generally see Bullen & Leake, 3rd ed., p. 441, *et. seq.*

91. All objections to the pleading of several pleas, replications or subsequent pleadings, or several avowries or cognizances, on the ground that they are founded on the same ground of answer or defence, shall be heard upon the summons to plead several matters.

Objections to pleadings to be heard on summons to plead several matters. 17 Vic. No. 21. s. 76.

Seeing that by R. 60 leave may be given (and usually is given) *ex parte*, this section can hardly be followed ; application might be made to the judge who made the order on summons, to rescind it. But where there is an application to strike out the pleas as embarrassing, see *Proudfoot v. Commissioners for Railways*, (1893) 10 W.N. 80.

Where leave was asked on summons to plead cross-action and other pleas, leave was refused to plead a bad plea : *Walsh v. O'Connor*, (1893) 9 W.N. 149.

Where leave had been given by a judge to plead certain pleas, the court was moved to rescind the order : *Murray v. Thompson*, (1860), 6 S.C.R. 89.

92. (1) The following pleas or any two or more of them may be pleaded together as of course without leave of the Court or a Judge, that is to say—

Certain pleas may be pleaded together without leave. *Ibid.* s. 77.

- (a) a plea denying any contract or debt alleged in the declaration ;
- (b) tender as to part ;
- (c) the Statute of Limitations ;
- (d) set-off ;
- (e) bankruptcy of the defendant ;
- (f) discharge under the laws relating to bankruptcy ;
- (g) plene administravit ;
- (h) plene administravit præter ;
- (i) infancy ;
- (j) coverture ;

**C.L.P. Act,
S. 92.**

- (*k*) payment ;
- (*l*) accord and satisfaction ;
- (*m*) release ;
- (*n*) not guilty ;
- (*o*) a denial that the property an injury to which is complained of is the plaintiff's ;
- (*p*) leave and license ;
- (*q*) son assault demesne ; and
- (*r*) any other pleas allowed by rule of Court to be so pleaded.

Pleading several matters without leave.

17 Vic. No. 21, s. 79.

(2) Except in the cases herein specifically provided for, if either party plead several pleas, replications, avowries, cognizances, or other pleadings without leave of the Court or a Judge, the opposite party may sign judgment.

(3) Such judgment may be set aside by the Court or a Judge upon an affidavit of merits and upon such terms as to costs and otherwise as the Court or Judge thinks fit.

The following pleas.—The plea of *non detinet* does not appear in the above list, but as this plea is substantially the same as that of "not guilty," or as "a plea denying a contract or debt alleged in the declaration," according as *detinue* is regarded as an action of tort or of contract, it is frequently pleaded together with any other of the pleas enumerated in this section without a judge's order.

In an action on a guarantee for advances made by the A.J.S. Bank before re-construction, and advances since made, to the Cumberland Building Land and Investment Company, the defendant pleaded—

1. That he did not make the said deed as alleged.
2. That the rights of the said bank were not transferred to and are not vested in the plaintiffs as alleged.
3. That large sums were not advanced and paid by the plaintiffs for the said company, under the said bond, and that no money is due and payable to the plaintiffs under the said bond.

No leave was obtained to plead these pleas, and the plaintiffs signed judgment. On an application to set aside the judgment, *held*, that several pleas denying the contract or debt cannot be pleaded together without leave of the court : *A.J.S. Bank v. Henderson*, (1897) 13 W.N. 166.

Any other pleas, etc.—No other pleas have been added to the above list.

Such judgment may be set aside . . . upon an affidavit.—In *Miegel v. Bowles*, (1894) 10 W.N. 172, there was an application by the defendant to set aside a judgment. The defendant pleaded several pleas (such pleas not being included in the above section) without leave of the court or a judge, and the plaintiff thereupon signed judgment. The affidavit in support stated : 1, that it was an oversight consequent on pressure of business that the necessary leave had not been obtained ; 2, that the application was made *bona fide* and not for purposes of delay that the defendant had a good defence on the merits, and that the omission of the counsel's usual note on the draft pleas was also one of the reasons occasioning the oversight. On objection being taken that the affidavit was insufficient, *Windeyer, J.*, in his judgment said : "I think the affidavit is sufficient. The pleas are filed and they disclose what the defence is. I have always set my face against judgment being snapped in this way, and I will continue to do so. The judgment must be set aside. Defendants must pay the costs of the judgment, but the costs of this application will be costs in the cause."

See also *Messiter v. Rose*, 13 C.B. 182 ; 22 L.J., C.P. 78. Several pleas founded on the same ground of answer are not allowed: R. 58, but on application to strike them out, a judge may allow them : see R. 59 (*post*).

See *Bullen & Leake*, 3rd ed., p. 442.

93. One new assignment only shall be pleaded to any number of pleas to the same cause of action, and such new assignment shall be consistent with and confined by the particulars delivered in the action (if any), and shall state that the plaintiff

New assignment.

Ibid. s. 80.

proceeds for causes of action different from all those which the **C.L.P. Act,** pleas profess to justify, or for an excess over and above what all **S. 93.** the defences set up in such pleas justify, or both.

As to when a new assignment is necessary, see Bullen & Leake's *Precedents of Pleadings*, 3rd ed. 653—656.

A new assignment must be delivered within the same time as a replication. The plaintiff must give notice to plead to it or to rejoin; and the time for pleading or rejoining is four days. A new assignment and a replication may be pleaded together to the same plea without leave.

94. No plea which has already been pleaded to the declaration shall be pleaded to such new assignment except a plea in denial, unless by leave of the Court or a Judge, and such leave shall only be granted upon satisfactory proof that the repetition of such plea is essential to a trial on the merits. Pleas not to be repeated. 17 Vic. No. 21, s. 81.

The general rights conferred by ss. 90, 92, seem to be limited by this section.

95. (1) The defendant, or the plaintiff in replevin, in any action in which if judgment were obtained he would be entitled to relief against such judgment on equitable grounds may plead the facts which entitle him to such relief by way of defence, and the Court may receive such defence by way of plea. Equitable defence. 20 Vic. No. 31, s. 48.

(2) Such plea shall begin with the words "for defence on equitable grounds," or words to the like effect.

In the application under this enactment of equitable principles by the courts of law, the following general rule has been laid down by the English Courts, and steadily adhered to:—That a plea can only be supported at law on equitable grounds where an absolute, unconditional and perpetual injunction would be granted in equity; so that, where the plea is followed by a common law judgment, complete and final justice may be done between the parties: *Mines Royal v. Magnay*, 10 Exch. 489; *Phelps v. Prothero*, 16 C.B. 370; 24 L.J. C.P. 225; *Wodehouse v. Farebrother*, 5 E. & B. 277; *Wood v. Copper Miners Co.*, 17 C.B. 561; *Clark v. Laurie*, 26 L.J. Ex. 38; *Gee v. Smart*, 8 E. & B. 313; *Drain v. Harvey*, 17 C.B. 257; *Flight v. Gray*, 3 C.B., N.S. 320; *Scott v. Littledale*, 8 E. & B. 815; 27 L.J. Q.B. 201; *Hyde v. Graham*, 1 H. & C. 593; *Wakley v. Froggatt*, 2 H. & C. 669; 33 L.J. Ex. 5.

The same rule has been laid down here; "it has been laid down over and over again that a plea of this kind (an equitable plea) could only be sustained where a Court of Equity would grant an unconditional injunction": *Mercantile Bank v. Wilson*, (1889) 5 W.N. 94. Where a Court of Equity would impose some term, e.g., payment of money, on the defendant, such a plea will not be held good: *Moore v. Suttlor*, (1883) 4 N.S.W.R. 283. See *Gardiner v. Halliday*, (1894) 15 N.S.W.R. 316; 11 W.N. 58, where the court said: "It (an equitable plea) would be a good plea if judgment on it for the defendant would put an end to all dispute arising out of this particular matter between the parties," p. 369.

It is impossible to specify the different cases in which a Court of Equity would give relief by way of absolute unconditional injunction. Any ground of equitable relief might conceivably give rise to a right of injunction, grounds such as accident, mistake, or fiduciary relationship between the parties.

Following are some instances of equitable pleas in cases in our own courts:—

A plea of fraud and mistake as to part of an amount due on a p.n.: *Devlin v. Lynch*, (1862) 1 S.C.R. 53. *Held*, a bad plea, as not answering the amount admitted due. Action by a mortgagee against a tenant; plea of surrender to the mortgagor; *held*, bad: *Mate v. Kidd*, (1863) 2 S.C.R. 270. Plea in an action against defendant as surety for rent payable by a third party, that he agreed to become a surety on the terms that a lease under seal should be executed, which had not been done: *Sullivan v. Wilson*, (1864) 3 S.C.R. 180.

In an action on covenant to pay money in a mortgage deed, defendant pleaded that plaintiff had sold the land (to himself) under power in the deed for the amount due; *held*, a good plea: *Kock v. Kemp*, (1867) 6 S.C.R. 107.

**C.L.P. Act,
S. 95.**

To a declaration on a bond against a surety—plea, that plaintiff agreed to be surety for advances to be made during a certain period, and the advances sued for were made after that period: *Joint Stock Bank v. Mortimer*, (1867) 6 S.C.R. 248. Action on a bond given as a continuing guarantee to secure advances—plea, that defendant agreed to procure certain lands to be handed to plaintiffs as security for amounts advanced, and plaintiffs agreed to accept such security and not to make further advances on defendant's credit: *Commercial Banking Co. v. Bennett*, (1870) 9 S.C.R. 238.

Declaration in trespass for erecting a wall and fence on plaintiff's land—plea, of agreement for predecessors in title of both parties that the wall and fence should be party walls and of acquiescence by plaintiff's predecessor: *Gannon v. McBurney*, (1871) 10 S.C.R. 157.

To an action on money counts defendants pleaded that the monies in their hands were proceeds of plaintiff's wife's separate estate, and that they had discounted a p.n. of the wife to the amount of the monies which p.n. was unpaid: *Nicholson v. A.J.S. Bank*, (1871) 10 S.C.R. 327.

Plea of claim of payment by a principal a good defence to action by an agent with whom the contract was made: *Mossman v. A.S.N. Co.*, (1873) 12 S.C.R. 62.

To an action for dishonoring a cheque—plea, that the money in the bank had been assigned by plaintiff to a third person before the cheque was drawn, and that the third person had given the bank notice of the assignment and had been paid the money: *Newman v. Bank of N.S.W.*, (1873) 12 S.C.R. 289.

To an action of covenant on a mortgage deed—plea of agreement to release the defendant on certain payments being made and other things done; *held*, bad; the payment not having been made: *Moore v. Suttor*, (1883) 4 N.S.W.R. 283.

Plea of equitable set-off *held* bad, no equity being shown: *Wellton v. Harnett*, (1886), 7 N.S.W.R. 74.

Plea of agreement to renew p.n.: *Williams v. Australian Cobalt Co.*, (1886) 7 N.S.W.R. 81; *E.S. & A.C. Bank v. Wilde* (1887) 3 W.N. 106.

Plea to p.n. of want of consideration: *Wilson v. Tarrant*, (1888) 9 N.S.W.R. 556.

Plea of wrongful seizure of certain goods in satisfaction of a Bill of Sale given as collateral security to secure payment of p.n. sued on; *held*, bad: *Gardiner v. Halliday*, (1894) 15 N.S.W.R. 316; 11 W.N. 58.

A plea may be good as a plea at law, although it is entitled on equitable grounds: *Mossman v. A.S.N. Co.*, (1873) 12 S.C.R. 62.

Equitable
defence after
judgment.
20 Vic. No. 31;
s. 49.

96. Any such matter which, if it arose before or during the time for pleading, would be an answer to the action by way of plea may, if it arise after the lapse of the period during which it could be pleaded, be set up by way of *audita querela*.

Audita querela was a writ given to afford a remedy to the defendant where some matter of defence, such as release, had arisen since judgment. It can only now be obtained by Rule of Court or order of a judge: R. 209 (*post*).

Equitable
replications.
Ibid.: s. 50.

97. (1) The plaintiff may, in answer to any plea, reply facts avoiding such plea upon equitable grounds.

(2) Such replication shall begin with the words "for reply on equitable grounds," or words to the like effect.

An equitable plea makes the subsequent pleadings equitable, although they are not so pleaded, and the replication may be supported on any ground that shows an answer to the plea: *Salvin v. Holylake Ry. Co.*, L.R. 1 Ex. 9, *per* Channell, B.

As a legal right must be alleged in the declaration, an equitable replication if inconsistent with that legal right, would be a departure from it and a variance, and therefore bad upon general demurrer: *Gulliver v. Gulliver*, 1 H. & N. 174; *Hunter v. Gibbons*, 1 H. & N. 459; 26 L.J. Ex. 4; *Reis v. Scottish Equitable Co.*, 2 H. & N. 19; *Schlumberger v. Lister*, 2 F. & E. 855; 29 L.J., Q.B. 157; and so also where a plaintiff seeks to set up in his replication some equitable matter inconsistent with the declaration: *Thames Iron Works, &c. Co. v. R. Mail S. Packet Co.*, 13 C.B., N.S. 358; 31 L.J., C.P. 169; and where in a reply to a plea of infancy, the plaintiff, in an action on contract, sought to set up fraudulent concealment or misrepresentation

thereof, such replication was held bad, as a departure : *De Roo v. Foster*, 12 C.B., N.S. 272 ; *Bartlett v. Wells*, 1 B. & S. 836 ; 31 L.J., Q.B. 57 ; but an equitable replication is properly pleadable if it is consistent with the legal right alleged in the declaration, as where it shows that it is inequitable for the defendant to set up the legal defence which he has pleaded ; *Lyall v. Edwards* 6, H. & N. 337 ; 30 L.J., Ex. 193 ; or where it is confined to an equitable answer to an equitable plea : *Sloper v. Cottrell*, 26 L.J., Q.B. 7 ; and see further, *Wood v. Duvarris*, 11 Exch. 493 ; and *Vorley v. Barrett*, 1 C.B., N.S. 225. An equitable replication may be pleaded in protection of an equitable claim advanced under a legal title, against a defence available only as against such legal title, as in the case of an assignee of a chose in action suing in the name of the assignor, and met by such pleas as set-off against, or payment to, or release by, the assignor, the assignee may reply equitably that the defendant had prior notice of the assignment : see hereon *De Pothonier v. De Mattos*, E.B. & E. 461 ; 27 L.J., Q.B. 260 ; *Wilson v. Gabriel*, 4 B. & S. 243 ; *Watson v. Mid Wales Ry. Co.*, L.R. 2, C.P. 593 ; *Dickson v. Swansea Vale Ry. Co.* L.R. 4, Q.B. 44 ; *Higgs v. N. Assam Tea Co.*, L.R. 4 Ex. 387 ; *In re N. Assam Tea Co.*, L.R. 10 Eq. 458, and *ex parte Chorley*, L.R. 11 Eq. 157 ; and see *Rawstorn v. Gandell*, 15 M. & W. 304. In a case where to the common money counts the defendant pleaded that he had with the plaintiff's consent delivered a promissory note on account of the debt to C., who still held it, a replication on equitable grounds that C. at the time of the delivery had been and still was a trustee of the plaintiffs, who were alone beneficially interested in the note of which the defendant had notice, and that the note was overdue and unpaid, was held a good answer to the plea : *National Savings Bank Association v. Tranah*, L.R. 2 C.P. 556.

Fraudulent concealment of a cause of action cannot be equitably replied to the Statute of Limitations : *Imperial Gas Co. v. London Gas Co.*, 10 Exch. 39 ; *Hunter v. Gibbons*, 1 H. & N. 459.

Instances of equitable replications may be found in our own courts :—

An equitable replication of part performance to a plea of the Statute of Frauds was held bad in *McLean v. Cooper*, (1862) 1 S.C.R. 186. To an action on a building contract, defendants pleaded that no certificate had been given ; a replication on equitable grounds that the engineer improperly and unjustly refused the certificate was held bad : *Dibbs v. Newcastle Coal & Copper Co.*, (1862) 1 S.C.R. 248.

In an action by payee against acceptor of a bill, defendant pleaded : (1.) that plaintiff was not the holder ; and (2.) that it was an accommodation acceptance. An equitable replication that the bill had been accepted to secure certain payments by the plaintiff to one Sherwin and handed to Sherwin without indorsement, and that the plaintiff collusively refused to endorse it, and that the action was brought by Sherwin for his benefit in the name of the plaintiff was held bad : *Thompson v. Thompson*, (1863) 2 S.C.R. 242. In an action on a guarantee bond, defendant pleaded equitably an agreement to release him on certain terms ; an equitable replication that the consideration for the agreement was found by the plaintiffs to be valueless, and that they at once repudiated the agreement was held good : see the case *Commercial Banking Co. v. Bennett*, (1870) 9 S.C.R. 238. In an action on a building contract it was pleaded that the architect gave a certificate fraudulently in collusion with the plaintiff ; an equitable replication that by the terms of the building contract the certificate should be final and not set aside or objected to on the ground of fraud was held bad : *Redmond v. Wynne*, (1892) 13 N.S.W.R. 39 ; 8 W.N. 103.

98. If it appears to the Court or Judge that any such equitable plea or equitable replication cannot be dealt with by a Court of law so as to do justice between the parties, the Court or Judge may order the same to be struck out on such terms as to costs and otherwise as to the Court or Judge seems reasonable.

Court or Judge may strike out equitable plea or replication.

20 Vic. No. 31, s. 51.

See (ante) s. 61 and notes.

99. Nothing in this Act shall alter or diminish the right of any party to proceed in equity in the same way as if this Act had not passed.

Proceedings in equity saved.

Ibid. s. 52.

100. (1) Every demurrer shall be in the Form No. 16 contained in the Second Schedule hereto, or to the like effect, and in the margin thereof some substantial matter of law intended to be argued shall be stated.

Form of demurrer and joinder in demurrer.

17 Vic. No. 21, s. 82.

**C.L.P. Act,
S. 100.**

(2) If any demurrer is delivered without such statement, or with a frivolous statement, it may be set aside by the Court or a Judge and leave may be given to sign judgment as for want of a plea.

(3) The form of a joinder in demurrer shall be in the Form No. 17 contained in the said Schedule, or to the like effect.

The word "plea" does not mean merely the answer to the declaration, but a pleading generally, as a replication rejoinder, etc.: *Cutts v. Surridge* (1847) 9 Q.B. 1015.

As to time for demurring and joinder in demurrer, see RR. 51, 54; and as to joinder in demurrer see R. 57 (*post*).

See sections 59 and 60 (*ante*).

A pleading is a demurrer within s. 62 (*ante*), and must be properly entitled and dated as therein directed, and be delivered between the parties.

And in the margin thereof, &c.—The practice here, however, does not follow the section, but by R. 162 (*post*) the points intended to be argued must be stated in the margin; and the other party in joining issue, if he intends to object to his adversary's pleading, must state the grounds of his objection; see RR. 162—166 and notes.

In England under the English practice it has been held that the statement in the margin should not be a mere repetition of the demurrer; but should state some special ground: *Ross v. Robeson*, 3 Dowl. 779. Several special grounds may be stated: *Whitmore v. Nicholls*, 3 Dowl. 521.

The want of the statement in the margin is no ground for objecting to the demurrer being argued; it only affords ground for setting it aside: *Lacy v. Umbers*, 3 Dowl. 732. Stating what is frivolous is stating nothing, *per Parke, B.*: *Tucker v. Barnsley*, 16 M. & W. 54; see also *Hoppe v. Single*, (1862) 2 S.C.R. 88.

A defective marginal note will be allowed to be amended on payment of costs: *Ross v. Robeson*, 3 Dowl. 779, and the case postponed to allow points for argument to be stated: *Parker v. Riley*, 3 M. & W. 230.

With a frivolous statement.—The application to the court to set aside a demurrer as frivolous must be made on an affidavit referring to the pleadings and setting them out: *Daniels v. Lewis*, 1 Dowl. N.S. 542. The application must be made promptly, as advantage cannot be taken after a joinder in demurrer, and notice of trial of issues in fact: *Norton v. Mackintosh*, 7 Dowl. 529. A frivolous demurrer is not an irregularity, waived by applying for further time to reply to it: *Cutts v. Surridge* (*supra*). And see *Irsael v. Turner*, (1893) 10 W.N. 66.

Amendment.—The party whose pleading is demurred to may amend, on obtaining leave to do so from the court, or a judge at chambers. This is generally only allowed on payment of the costs of the demurrer; but the judge at chambers may give nominal costs, and the court will not review his decision: *Tomlinson v. Ballard*, (1843) 4 Q.B. 642; see also *Marshall v. Fryer*, (1888) 5 W.N. 14.

Where a purely technical point is taken, the court will allow an amendment to be made on demurrer: *Jacobs v. Smith*, (1887) 8 N.S.W.R. 21; 3 W.N. 98.

As to the time for the other party's pleading after amendment, see following section.

If he does not amend, he must join in demurrer in four days, R. 54 (*post*); but he may obtain further time, if necessary. The joinder should be entitled and dated, as directed by s. 62.

The issue or demurrer book must be made up and duly delivered by the suitor, his attorney or agent, as the case may be, RR. 163—166; and see *Jewell v. Parr*, 16 C.B. 684.

The defendant demurred to the plaintiff's declaration. When the matter came before the court it appeared that no demurrer book had been filed. The court struck the case out of the day's list: *Israel v. Turner*, (1893) 10 W.N. 66.

Where the declaration is demurred to, the pleas should not appear in the demurrer book. There should be nothing there but the declaration and the demurrer: *Metcalfe v. Holdsworth*, (1894) 10 W.N. 222.

As to costs, see *Fisher v. Snow*, 3 Dowl. 27.

As to setting down demurrer, see R. 164 (*post*); filing and service of demurrer book, R. 165. **C.L.P. Act, S. 100.**

The defendant demurred to the declaration on the 15th of June, and as the plaintiff had not set the demurrer down for argument, added a joinder in demurrer on the 15th of November. *Held*, that the defendant was entitled to an order allowing him to set it down for argument: *Bead v. Berrick*, (1899) 15 W.N. 192; but now by R. 166 (*post*), if plaintiff fails to file the demurrer book for twenty days after joinder defendant may file it by leave of the court or a judge. Plaintiff has the carriage of a demurrer, and if set down by the defendant it will be struck out: *Municipal District of Rockdale v. Knight*, (1896) 13 W.N. 10; but he must do this without any unnecessary delay, otherwise the defendant may obtain an order from a judge giving him leave to set it down: see *Freeman v. Withers*, (1877) Knox. 6; and *Bead v. Berrick* (*supra*), but now see R. 166.

On a demurrer to a plea of cross action it appeared that leave had been granted to plead the plea together with other pleas. The plaintiff was represented on that application. Objection was taken on the demurrer that as leave had been granted to plead this plea the demurrer could not be heard. Objection overruled: *The Attorney General v. McLeod and another*, (1893) 14 N.S.W.R. 121; 9 W.N. 159.

Under the English practice the plaintiff was, upon cross demurrers in the Queen's Bench and Common Pleas, entitled to begin, and so here: *Perry v. Towns*, (1862) 1 S.C.R. 73; *Ross v. Miller*, (1863) 2 S.C.R. 332.

On a demurrer only one counsel is heard, and the junior counsel will not, as a general rule, be allowed even to read the pleadings. But this rule was relaxed where the senior was not present when the case was called on. The junior in that instance was allowed to read the pleadings, and the senior on coming into court was allowed to argue the case: *Ricketson v. Cook*, (1899) 16 W.N. 28; see *Miller v. Gulliver*, (1880) 1 N.S.W.R. 176.

101. (1) Where an amendment of any pleading is allowed, no new notice to plead thereto shall be necessary, but the opposite party shall be bound to plead to the amended pleading within the time specified in the original notice to plead, or within two days after amendment, whichever shall last expire, unless otherwise ordered by the Court or a Judge. Time for pleading after amendment. 17 Vic. No. 21, s. 83.

(2) If the amended pleading has been pleaded to before amendment, and is not pleaded to *de novo* within two days after amendment, or within such other time as the Court or a Judge shall allow, the pleadings originally pleaded thereto shall stand and be considered as pleaded in answer to such amended pleading.

See notes to preceding section.

See also notes to ss. 34 and 36 (*ante*).

And as to time allowed for pleading, see notes to s. 73 (*ante*).

PART VIII.

DISCOVERY AND INSPECTION, AND NOTICES TO ADMIT AND PRODUCE.

102. (1) Upon the application of either party to any action or other proceeding, upon an affidavit by such party or his attorney of his belief that any document to the production of which he is entitled for the purpose of discovery or otherwise is in the possession or power of the opposite party, the Court or a Judge may order that— Discovery of documents. 20 Vic. No. 31, s. 23.

(a) the party against whom such application is made; or

(b) if such party is a body corporate, some officer to be named of such body corporate,

C.L.P.A.

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C.L.P. Act, s. 102. shall answer on affidavit stating what documents he or they has or have in his or their possession or power relating to the matters in dispute, or what he knows as to the custody such documents or any of them are in, and whether he or they objects or object to the production of such as are in his or their possession or power, and if so on what grounds.

(2) Upon such affidavit being made the Court or Judge may make such further order thereon as shall be just.

The application under this section is in the first place for an order that the other party should make an *affidavit of discovery*. Inspection of the documents discovered is a subsequent and separate matter: *Tindale v. Brown*, (1887) 3 W.N. 108; *Chalmers v. McNeil*, (1884) 1 W.N. 53; though, as a matter of common practice, by consent an order for inspection is often made on the summons for discovery. It is further to be observed that the order for discovery can only be obtained when the party applying can swear to his belief that the opposite party is in possession of some one document to the production of which he is entitled for the purpose of discovery or otherwise. This seems to mean that an order for discovery will be made only where discovery would be followed by inspection: *Chalmers v. McNeil*, (1884) 1 W.N. 53; but as to this see post, **Any document**.

Application.—The application is by summons in chambers; whether it could be made *ex parte* qu: *Heath v. Daly* (1897) 14 W.N. 59; for form of summons see Chitty's Forms, 162. The summons must set out the grounds or refer to them as appearing in the affidavit: *Heath v. Walters*, (1896) 12 W.N. 109.

Party to any action or other proceeding.—An order will not be made against the defendant in an action for a penalty: *Proudfoot v. Proctor*, (1887) 3 W.N. 69. The section applies to interpleader (*semble*): *White v. Watts*, 12 C.B., N.S. 267; 31 L.J. C.P. 381; and to an action of ejectment: *Heath v. Walters*, (1896) 12 W.N. 168, see *Lyell v. Kennedy*, 8 A.C. 217. The right to discovery is especially favoured in marine insurance actions: *China Steamship Co. v. Commercial Union Co.*, 8 Q.B.D. 142.

Affidavit by the party or his attorney of his belief.—The affidavit must be by the party or his attorney. It cannot be made by the attorney's clerk: *Roue v. N.S.W.F.F. & I. Co.*, (1898) 15 W.N. 117.

The affidavit should set out so much of the pleadings and facts as are necessary to show how far the document referred to, as in the possession of the opposite party, is relevant, and the nature of the document itself should be shown. See the form, Chitty's Forms, 160. It is also advisable to set out the grounds of the deponent's belief, *per Stephen, J.*: *Stick v. Lark*, (1894) 10 W.N. 172; *Smith v. Goldring*, (1887) 4 W.N. 13; *Heath v. Walters*, (1896) 12 W.N. 168.

Though if the court can see on the whole facts reasonable grounds for the belief that is enough: *Hall v. Brunton*, (1894) 10 W.N. 196.

Any document, &c.—The document referred to must be one to the production of which applicant is entitled for the purpose of discovery or otherwise. Whether this means a document of which the applicant is entitled ultimately to inspection, *quære*: see *Heath v. Walters*, 12 W.N. 109; *Chalmers v. McNeil*, (1884) 1 W.N. 53, in favour of that view; but in *Forshaw v. Lewis*, 10 Ex. 712, the court held that the fact that the document might subsequently be privileged from inspection, is not a reason for refusing a discovery order.

The existence of a particular document must be shown: *Bank of N.S.W. v. Brown*, (1887) 4 W.N. 118; *Heath v. Walters*, (1896) 12 W.N. 109; *Robson v. Inglis*, (1888) 4 W.N. 156. Apparently an affidavit made by respondent denying that he has the document referred to will be received: *Heath v. Walters*, (1896) 12 W.N. 168; *Heath v. Daly*, (1897) 14 W.N. 59.

Possession or power.—These are the same words as are used later in the section as to the affidavit of discovery, and presumably have the same meaning. In reference to the affidavit of discovery they have been held to mean possession of the party jointly with others even though under such circumstances he would not be bound subsequently to produce such documents: *Swanston v. Lishman*, 45 L.T. 360; see (*infra*) **Affidavit of discovery**.

Party against whom such application is made.—This includes a nominal defendant under the Claims Against the Government and Crown Suits Act, 1897 (*post*): *Morrissey v. Young*, (1896) 17 N.S.W.R. Eq. 157; 13 W.N. 52; 12 W.N.

90; overruling *Wilson v. Minister for Works*, (1884) 1 W.N. 68; *Anderson v. Stuart*, (1884) 1 W.N. 94; and *Bank of New South Wales v. Dibbs*, (1885) 2 W.N. 9. See also *Rickelson v. Smith*, (1895) 16 N.S.W.R. Eq. 170; 12 W.N. 14.

An infant cannot be made to give discovery: *Curtis v. Mundy*, (1892) 2 Q.B. 178; nor can the next friend: *Lawton v. Elwes*, 48 N.T. 425.

One defendant cannot have discovery against another: *Brown v. Watkins*, 16 Q.B.D. 125.

Body corporate.—The secretary of an incorporated company is as a rule the proper person to answer: *Berkeley v. Standard Discount Co.*, 13 Ch. D. 97. The officer should, according to the section, be named in the order. His affidavit must disclose all the documents in the possession of the corporation: *Mummery v. Union Bank*, (1889) 6 W.N. 74.

Time for application.—The usual time for discovery is after plea, as it is difficult to say until then what is material: *Mellor v. Thompson*, 49 L.T. 222; though the court has a discretion under particular circumstances to grant discovery at any time: *ibid.* A plaintiff may have discovery before declaration where he cannot frame his declaration without: *Webb v. Pringle*, (1896) 13 W.N. 100; such discovery ought not apparently, to be general, but confined to such specified documents or classes of documents as the plaintiff is entitled to have inspection of before declaration; these are, speaking generally, such documents as defendant may be considered to hold as trustee for the plaintiff; see notes to next section (**Inspection**). Except in this way, and for this purpose, the application has been refused: *Freehill v. Crowley*, (1895) 11 W.N. 146; *Clarke v. Lees*, (1896) 12 W.N. 137.

Similar considerations apply to a defendant's application before plea pleaded. Where application was made before plea, but was not shown to be necessary for the purpose of pleading, the application was granted to save expense, but affidavit of discovery ordered to be filed after plea: *Marks v. Lloyd*, (1898) 14 W.N. 122. And in *Baird v. Crawford*, (1899) 20 N.S.W.R. 195, the court refused inspection, on this ground, amongst others, overruling *Cohen, J.*, 15 W.N. 248. But where the discovery was asked for the purpose of pleading the order was made: *A.J.S. Bank v. Meldrum*, (1901) 18 W.N. 233.

In Equity discovery was always granted to defendant before statement of defence of documents mentioned in the statement of claim; for any other order special circumstances had to be shown: *Davies v. A.J.S. Bank*, (1898) 14 W.N. 152.

The Order.—If the discovery application is granted the order will be made in the form, Chitty's Forms, 162. The time within which the affidavit is to be made will be stated; and if it be a corporation, the officer named.

Costs.—The costs of the application and of the discovery are usually costs in the cause, and this, although the party called upon to discover has refused to consent to an order before summons, but does not oppose the order in chambers: *McLeod v. Metayer*, (1901) 18 W.N. 5.

Answer on affidavit.—The affidavit of discovery must disclose all documents relevant to the subject matter which the party or body corporate has in his or its possession or power; and further must state what he knows as to the custody of the documents or any of them, and whether he objects, and on what grounds, to their production: see Form, Chitty's Forms, 162.

The documents discovered must relate to the matters in dispute. "Any document which will throw any light on the case is *prima facie* subject to inspection," and therefore, must be discovered: *Hutchinson v. Glover*, 1 Q.B.D. 138. All documents must be discovered which contain information which may either directly or indirectly enable the party requiring discovery either to advance his own case or damage the case of the adversary: *Compagnie Financière v. Peruvian Guano Co.*, 11 Q.B.D. 55. The documents to be produced are not confined to those which would be evidence either to prove or disprove any matter in question in the action; every document relates to the matter in question in the action which not only would be evidence upon any issue, but also which it is reasonable to suppose contains information which may—not which must—either directly or indirectly, enable the party requiring the affidavit either to advance his own case or to damage the case of the adversary (*ibid.*). And see *Bustros v. White*, 1 Q.B.D. 425. As to whether such documents may be protected from inspection, see (*post*) **Object and on what grounds**.

Possession or power.—All documents must be scheduled which are in the corporeal possession of the party making the affidavit, whether he has exclusive or only partial property in them: *Clinch v. Financial Corporation*, L.R. 2 Eq. 271. A partner must schedule relevant partnership documents, although other partners are not parties: *Lazarus v. Morley*, 5 Jur., N.S. 1119; *Vyse v. Foster*, L.R. 13 Eq. 602.

**C.L.P. Act,
S. 102.**

Documents in the possession of a solicitor or agent must of course be included ; but not documents the private property of the solicitor : *O'Shea v. Wood*, (1891) P. 286. If the party has full legal possession of the documents, the fact that someone else may have an interest in them will not protect them from production : *Davies v. Frost*, (1898) 19 N.S.W.R., Eq. 46.

The documents, to the production of which no objection is raised must be described and identified in such a way that the other party may be able to ask for those he wishes to see ; *Cooke v. Smith*, (1891) 1 Ch. 509. "You must not only make up the documents in bundles, but you must describe what the documents are ; for instance, a bundle of letters from A. to B., and you must identify each document by marking it separately," (*ibid*). "The documents numbered from 1 to 20 and tied up in a bundle marked A," is sufficient (with a description) : *Taylor v. Batten*, 4 Q.B.D. 85. "Aff that the Court requires where there is no question of privilege or objection to produce the documents is that they should be so far identified that the court can see that the documents referred to are produced if required," (*ibid*). But in *O'Brien v. McKenzie*, (1900) 21 N.S.W.R., Eq. 117 ; 17 W.N. 95, *Simpson*, C.J. Eq., held after considering all these cases that it was sufficient to describe the documents as numbered, and in bundles, without other description : see *Browne v. Browne*, (1895) 12 W.N. 3.

As to documents for which protection is claimed, it is sufficient to identify them (as in bundles numbered) without describing them : *Budden v. Wilkinson*, (1893) 2 Q.B. 432 ; *Ricketson v. Smith*, (1896) 17 N.S.W.R., Eq. 203 ; 13 W.N. 26. Where part of a document is relevant, either the relevant part only may be scheduled, or the whole document may be scheduled and protection claimed for parts sealed up or otherwise identified.

Object and on what grounds.—As to documents which are not in the sole legal possession of the discovering party, although he must mention them in his affidavit of discovery, he is not bound to produce them ; but to obtain such protection he must mention the names of his co-owners and the nature of their interest : *Bovill v. Cowan*, 5 Ch. 495. It is not necessary to state that the co-owner refuses his consent to the production : *Kearsley v. Phillips*, 10 Q.B.D. 465.

As to documents in the sole possession or power of the party, irrelevant documents need not be scheduled at all, and an order to inspect an unpublished manuscript in the possession of the defendants was refused in an action for libel against a newspaper, apparently on this ground : *Dibbs v. Daily Telegraph Co.*, (1889) 5 W.N. 52.

As to parts of documents disclosed, objection may be made to produce these parts on the ground of irrelevancy, and the oath of the party making the affidavit is conclusive on this point (subject, as pointed out, *infra*), "Conclusiveness of claim to protection" s. 103 (*infra*). But once documents are admitted to be relevant, they must be produced unless protected on one of the grounds below : *Davies v. Frost*, 19 N.S.W.R. Eq. 46.

There are only four grounds on which production of relevant documents can be objected to :—

1. A party is not compelled to give discovery which will expose him to the risk of any kind of punishment or tend to incriminate him. He must swear that to the best of his knowledge information and belief, the result of the production of the document would be to incriminate him : *Webb v. East*, 5 Ex. D. 108. See *Stewart v. The Commercial Bank of Australia*, (1894) 15 N.S.W.R., Eq. 233 ; 11 W.N. 92. Production of documents tending to prove adultery will not be ordered : *Redfern v. R.* (1891) P. 139. Discovery will not be given against the defendant in an action for penalties : *Proudfoot v. Proctor*, (1886) 3 W.N. 69.

Query, whether the judge ought not to be satisfied himself that the objection is well founded : *Ex. p. Reynolds*, 20 C.D. 294. In *Stewart v. Commercial Bank of Australia* (*supra*), *Manning*, J., looked at the passages of the documents in question, but this was by consent.

2. **Legal Professional Privilege (General).**—On the ground of legal professional privilege communications between any person and his legal advisers (in that capacity) are absolutely privileged, whether in anticipation of litigation or not : *Minet v. Morgan*, 8 Ch. 361 ; *Lawrence v. Campbell*, 4 Drew. 485. So where the communications are made through an agent for that purpose : *Wheeler v. Le Marchant*, 17 C.D. 675, 682.

Communications between solicitor and client for the purpose of contriving a fraud are not privileged : *In re Postlethwaite*, 35 C.D. 722 : See *Bullivant v. A.G. for Victoria*, (1901) A.C. 196.

There is another class of communication which is regarded as privileged: Documents containing information obtained on the advice of a solicitor (or spontaneously for the purpose of submission to a solicitor) if litigation is actually pending, or in the belief that it will ensue, are protected; see *Fraser v. A.J.S. Bank*, (1896) 17 N.S.W.R. Eq. 197; 13 W.N. 53. Not so, however, communications from an agent not made in view of litigation, though the litigation may in fact have followed (*ibid*): *Dibbs v. C.S.R. Co.*, (1871) 10 S.C.R. 323. In *Ellis v. Meyerfeld*, (1877) Knox. 366, inspection of reports by an agent (not made apparently in anticipation of litigation) was refused; but whether this case would now be followed, *quære*, except perhaps on the ground put by *Hargreave, J.*, that it was respondents evidence (*infra*).

**C.L.P. Act,
S. 102.**

It is advisable, if the fact is so, to state that the document was called into existence "solely" for the purpose of the anticipated litigation, though perhaps this is not absolutely necessary: *London & Tilbury Co. v. Kirk*, 28 Sol. J. 688; *Williams v. Railway Commissioners*, (1902) 19 W.N. 300.

3. Disclosing Party's Evidence.—As disclosing the party's evidence. To establish this ground it must be shown that the documents in question form, or support, or evidence, or relate exclusively to the party's own case, and that they contain nothing supporting or tending to support the adversary's case.

The party may add that the documents contain nothing impeaching his own case or title: *Morris v. Edwards*, 15 A.C. 309; *Budden v. Wilkinson*, (1893) 2 Q.B. 432. See on this point, *Ricketson v. Smith*, (1896) 17 N.S.W.R. Eq. 203; 13 W.N. 26, as to the cases in which a party should or should not add this statement. "Where it is the object of the party seeking discovery to impeach the title or claim of the party giving discovery, then the party making the affidavit must state that the documents contain nothing impeaching the deponent's case or title. Where the affidavit of documents is made by a plaintiff at the instance of the defendant, such an allegation must nearly always be necessary because in ninety-nine cases out of every hundred it is part of the case of the defendant to impeach the plaintiff's title. Where, however, the plaintiff obtains an affidavit of documents from the defendant, the affidavit in many cases does not require to state that the documents contain nothing to impeach the defendant's title or case, because the plaintiff is not concerned in impeaching the defendant's title, and is only concerned in establishing his own." *per Owen, J.* (*ibid*). So that it is in all cases safer and often necessary to add these words, if it can be done. In an earlier case: *Brown v. Brown*, (1896) 13 W.N. 8, inspection was refused though these words were not in the affidavit. See another case: *Palmer v. Trustees of the Savings Bank*, (1900) 17 W.N. 157; and *Allen v. City Bank of Sydney*, (1902) 19 W.N. 203.

Where a plaintiff swore that certain documents "are not in any manner material to the defendant's case," and, further that "they do not relate to the defendant's case," it was held that these expressions were equivalent to saying that the documents did not support or tend to support the defendant's case: *Baird v. Crawford*, (1899) 20 N.S.W.R. 195; 15 W.N. 317, overruling *Cohen, J.*, 15 W.N. 248.

4. Public official documents are protected, if it would be injurious to the public interest to disclose them. The objection should be made by the head of the department: *Kain v. Farrer*, 37 L.T. 469.

Such further order.—The further order following a discovery affidavit is usually for inspection of documents, as to which no privilege is claimed, or as to which privilege is wrongly or insufficiently claimed. On the question of inspection, see notes to next section.

Further affidavit.—In some cases the party making discovery will be ordered to make a further affidavit: *Mummery v. Union Bank*, 6 W.N. 74.

Conclusiveness of affidavit.—The general principle is that the affidavit of documents is conclusive. The party seeking discovery cannot show by a contentious affidavit that the affidavit of discovery is insufficient: *Jones v. Monte Video Gas Co.*, 5 Q.B.D. 556. But if it appear from the affidavit of discovery itself, or from the documents referred to in that affidavit, or from some admission in the pleadings, that there are other documents not discovered, then a further affidavit may be ordered (*ibid*): *Compagnie Financiere v. Peruvian Guano Co.*, 11 Q.B.D. 55; and these are the only sources of information that the court can look at (*ibid*). A further affidavit more distinctly specifying bundles of letters was ordered in *Browne v. Browne*, (1895) 12 W.N. 3.

103. Upon the application of either party to any action or other proceeding in any case in which, before the passing of the Act sixteenth Victoria number fourteen, a discovery might

Inspection of
documents.
10 Vic. No. 14,
s. 6.

C.L.P. Act, S. 103. have been obtained by filing a bill, or by any other proceeding in a Court of Equity at the instance of such party, the Court or a Judge may order the opposite party to allow the party making the application to inspect all documents in the custody or under the control of such opposite party relating to such action or proceeding, and if necessary to take examined copies of the same or to procure the same to be duly stamped.

Inspection at common law.—At common law the English courts were accustomed to grant inspection in certain cases; and in reference to such cases the following note (from Day's Common Law Procedure Acts) may be consulted:—

It had long been the practice of the courts, in the exercise of their equitable jurisdiction, to grant inspection of any instrument on which the plaintiff sought to charge the defendant as a party to such instrument: *Ratcliffe v. Bleasby*, 3 Bing. 148, when only one part of the instrument has been executed, and the party holding it, was consequently trustee for both: *Blogg v. Kent*, 6 Bing. 614; *Devenoge v. Bouverie*, 8 Bing. 1; *Doe d. — v. Slight*, 1 Dowl. 163; *Doe d. Morris v. Roe*, 1 M. & W. 207; so where a counterpart had been lost: *Street v. Brown*, 6 Taunt. 302; so of letters, where no copies had been kept, and where the action was based upon the letters: *Price v. Harrison*, 8 C.B., N.S. 617; 29 L.J., C.P. 335; *Stone v. Strange*, 3 H. & C. 541; 34 L.J. Ex. 72; see also *Woodcock v. Worthington*, 2 Y. & J. 4; *Neale v. Swind*, 2 Cr. & J. 278; *Travis v. Collins*, 2 Cr. & J. 625. The holder must have been a party, or identical with a party, to the action: *Doe d. Morris v. Roe* (*supra*). He must have been in a position to be regarded as a trustee for the party requiring inspection: *Ratcliffe v. Bleasby* (*supra*); *Cocks v. Nash*, 9 Bing. 723; thus an agent has been compelled to grant inspection of books to his principal: *Jones v. Palmer*, 4 Dowl. 446; an attorney has been obliged to grant inspection of a case with the opinion of counsel thereon (procured for the defendant by the plaintiff as his attorney) to his client: *Evans v. Delegal*, 4 Dowl. 374; a member of a provisional committee to grant inspection of the subscriber's agreement to an allottee: *Steadman v. Arden*, 15 M. & W. 587.

The party requiring inspection must have been a party, or he must have made title under a party, to the instrument: *Smith v. Winter*, 3 M. & W. 309; *Lawrence v. Hooker*, 5 Bing. 6; *Cocks v. Nash* (*supra*).

Inspection was granted to enable a party to frame his pleading, or to support his action or defence, as the case might be, though the document was not declared upon: *Steadman v. Arden* (*supra*).

It has been refused when sought for as a foundation for a plea in abatement: *Beale v. Bird*, 2 D. & Ry. 419; also where the object was to discover alleged forgeries: *Chetwind v. Marnell*, 1 B. & P. 271; *Hildyard v. Smith*, 1 Bing. 451. But see *Wolner v. Devereux*, 9 Dowl. 672, where *Tindal*, C.J., takes it for granted that a suggestion of forgery, or an allegation that the instrument had been dealt with since it was executed, or the party swearing that he had no recollection of having made a note, would be ground for an inspection. It has been decided that an allegation that the plaintiff procured bills by fraud, is no ground for an application: *Threlfall v. Webster*, 1 Bing. 161. Inspection has been refused when asked with a view to the discussion of a rule for a new trial: *Wood v. Morewood*, 9 Dowl. 44; and see *Pratt v. Goswell*, 9 C.B., N.S. 706; and inspection of a partnership deed, which the plaintiff had refused to execute, was refused to him, in a suit brought by him for breach of the agreement to take him into partnership; as he was no party to the deed: *Ratcliffe v. Bleasby*, 3 Bing. 148. So inspection of letters re-delivered by the defendant to the plaintiff, and which he alleged contained a release of his promise, was refused; the plaintiff not being a trustee: *Goodliff v. Fuller*, 14 M. & W. 4. Where title to land came into question in an action of trespass, inspection was refused: *Pickering v. Noyes*, 1 B. & C. 262. But a defendant in ejectment, brought upon a forfeiture, has been allowed inspection of the leases under which he claimed: *Doe d. Child v. Roe*, 1 E. & B. 279.

It appears that the abolition of profert and oyer (see *ante*) and the nature of the substituted proceeding, renders the judges more liberal in the exercise of this equitable jurisdiction, even if they do not incidentally enlarge it: see *per Lord Campbell* in *Doe d. Child v. Roe* (*supra*); and *per Willes*, J., in *Penarth Harbour, &c. Co. v. Cardiff Waterworks Co.*, 7 C.B., N.S. 816; L.J. 29, C.P. 230.

This right has been recognised as continuing in England even since the Judicature Acts: *Brown v. Niell*, 16 Q.B.D. 229; *China Steam Co. v. Com. Ass. Co.*, 8 Q.B.D. 142; and presumably still applies here.

After discovery affidavit.—Inspection usually follows the order for discovery and the discovery affidavit. The application, strictly speaking, should be a separate one: *Tindale v. Brown*, (1887) 3 W.N. 108, though inspection is frequently provided for in the discovery order. Inspection will be granted as a matter of course of all documents disclosed by the discovery affidavit for which protection is not claimed. As to those documents for which protection is claimed, if a proper case is made out for protection (as to which see note to previous section) inspection of them will be refused.

**C.L.P. Act,
S. 103.**

Conclusiveness of claim to protection.—The oath of the party claiming protection is conclusive, unless the court can see either from the affidavit itself or from the documents referred to therein, or from the pleadings that the party claiming protection has erroneously misrepresented or misconceived the nature of the documents in question: *A.-G. v. Emerson*, 10 Q.B.D. 191; *Baird v. Crawford*, (1899) 20 N.S.W.R. 195; 15 W.N. 317.

Place and time of inspection.—The order will provide for the place and time of inspection. Where defendants carried on business at Bourke, application for inspection of their books (sworn to be in daily use) in Sydney was refused, and inspection ordered at Bourke: *Johnston v. Bourke Meat Preserving Co.*, (1897) 13 W.N. 115. Where a plaintiff company carried on business in Melbourne and its books were sworn to be in daily use there, on defendant's application for inspection of the books in Sydney, *Stephen, J.*, gave plaintiffs the opportunity of sending their book to Sydney for inspection at defendant's cost, otherwise plaintiffs to pay the cost of defendant's solicitor going to Melbourne to inspect: *Broken Hill &c., Co. v. Foreman*, (1896) 12 W.N. 169.

In *Janison v. McKay*, (1885) 1 W.N. 119, inspection was refused, but copies of letters ordered to be given at applicant's expense.

Take copies.—In *Willis v. A.J.S. Bank*, (1901) 18 W.N. 232, *Owen, J.*, held that the proper order to make is that the inspecting party requiring copies of the documents inspected should order the copies from the solicitor on the other side at the usual scale of costs.

Costs.—The ordinary rule as to costs seems to be that costs of inspection should be paid by applicant; costs of the application, costs in the cause, as in *Johnston v. Bourke Meat Preserving Co.*, (1897) 13 W.N. 115.

104. (1) Upon the application of either party, the Court or a Judge may make a rule or order upon such terms as to costs and otherwise as the Court or Judge thinks fit for the inspection by the jury or by such party or by his witnesses, or by so many and such of the persons summoned as jurors for the trial as may be thought desirable, of any real or personal property, the inspection of which may be material to the proper determination of the question in dispute.

Inspection of
real or
personal
property.
20 Vic. No. 31,
s. 24.

(2) Nothing herein contained shall affect the provisions of the Act eleventh Victoria number twenty as to obtaining a view by a jury.

The removal of obstructions to inspection may be ordered as incident thereto: *Bennett v. Griffiths*, 3 E. & E. 467; 30 L.J. Q.B. 98; see also *White v. Story*, 43 L.T. 91, Ex. T.T. 1867.

See also an order for inspection of real property made in Chancery by *Stuart, V.-C.*, and revised by the Lords Justices in *Ennor v. Barwell*, 8 W.R. 300; S.C. on appeal, 1 De G., F. & J. 529.

Under the Judicature Acts (O. 50, R. 3) a plaintiff getting permission to inspect was ordered to pay the costs of the inspection in any event: *Mitchell v. Darley Main Colliery Co.*, 10 Q.B.D. 457.

It is the common practice now for the whole of the jury, at some stage of the case agreed upon between the parties, to inspect property in question. They are usually accompanied by a sheriff's officer, and by representatives of each party.

The court itself will view the *locus in quo*: *O'Brien v. Minister for Works*, (1886) 2 W.N. 99. Where, by an innocent misunderstanding, a jury were taken to view the *locus* without an order, this would be ground for a new trial: *Gritton v. Railway Commissioners*, (1901) 18 W.N. 86.

**C.L.P. Act,
S. 104.**

But where a jury by arrangement between the parties went to see a theatrical performance, in question in a libel action, the fact that some of the jurymen took their wives is no ground for a new trial: *Menzies Stuart v. Macleod*, (1901) 18 W.N. 82.

Where a jurymen, on his own account, during the progress of a trial, went to view the *locus* and conversed with a witness there, a new trial was granted upon terms; *Perdriau v. Moore*, (1888) 9 N.S.W.R. 143; 4 W.N. 172.

Act 11 Vic. No. 20.—See now Jury Act, 1901, ss. 69—71.

Notice to admit
17 Vic. No. 21,
s. 92.

105. (1) Either party may call on the other party by notice to admit any document saving all just exceptions.

(2) In case of refusal or neglect to admit, the costs of proving the document shall be paid by the party so neglecting or refusing, whatever the result of the action may be, unless at the trial the Judge certifies that the refusal to admit was reasonable.

(3) No costs of proving any document shall be allowed unless such notice be given, except in cases where the omission to give the notice is, in the opinion of the prothonotary, a saving of expense.

Notice to admit.—See R. 135; and Form No. 2, Sch. I to Rules, *post*.

Notice to admit may be given in all trials, writs of inquiry and inquisitions of any kind, R. 136 (*post*).

See as to abuse of such a form: *Edmunds v. Great Railway Co.*, 12 C.B. 419.

Any document.—It seems that the words, "any document" include a foreign judgment: *Smith v. Bird*, 3 Dowl. 641.

Saving all just exceptions.—The admission is to be made, "saving all just exceptions." A party admitting his handwriting to a bill is not precluded from objecting to its admissibility in evidence on the ground of its being unstamped; *Vane v. Whittington*, 2 Dowl. N.S. 757. But where a party admitted a document described as a "counterpart lease," and at the trial the instrument turned out to be a lease with a counterpart stamp only, he was considered precluded from taking the objection: *Doe d. Wright v. Smith*, 8 Ad. & E. 255. The admission of a mere signature will not dispense with the production of the bill at the trial: *Vane v. Whittington* (*supra*); and see *Chaplin v. Levy*, 9 Exch. 531, where there was no reserve of just exceptions. Nor will the admission that the copy is a true copy dispense with the necessity of accounting for the non-production of the original, before the copy can be admitted in evidence: *Sharpe v. Lambe*, 11 Ad. & E. 805. An admission of a document, as of a certain date, will preclude the party from calling for an explanation, if the date appears to be written on an erasure: *Poole v. Palmer*, 1 Car. & M. 69.

So, after the admission of a deed, an objection to its being received in evidence on the ground of an interlineation, is waived: *Freeman v. Steggall*, 14 Q.B. 202; 19 L.J., Q.B. 18. So an admission of a bill "drawn by the plaintiff upon, and directed to the defendants as A. & Co., and accepted by B. for the defendants as A. & Co.," precludes the defendants from denying the authority of B. to bind A. & Co. by such acceptance, and it is not a mere admission that he signed an acceptance purporting to bind A. & Co.: *Wilkes v. Hopkins*, 1 C.B. 737; and see *Hunt v. Wise*, 1 F. & F. 445; but a party may, without peril of costs in any event, refuse to admit documents when he is also required to admit the authority of the writer: *Oxford, &c. Ry. Co. v. Scudamore*, 1 H. & N. 666. An admission once made cannot, it would seem, be withdrawn; it will bind the party, for instance, on a new trial: *Doe v. Bird*, 7 C. & P. 6.

A formal admission only should be relied upon: *Holford v. Hughes*, 10 W.R. 60.

See further upon the effect of admissions: *Hawk v. Freund*, 1 F. & F. 294; and *Hills v. London Gas Light Co.*, 1 F. & F. 346.

The notice to admit must be given a reasonable time before the trial. The object of the notice necessitates the observance of this. A notice to admit documents, the originals of which were in Harwich, served on the agent in London of the defendant's attorney, who lived in Harwich, four days before the commission day at New-

castle, was not considered a reasonable time before the trial, and the Master, who had disallowed the costs of proving the documents, was ordered to review his taxation ; **C.L.P. Act, S. 105.**
Tynn v. Billingsley, 3 Dowl. 310.

In case of refusal or neglect to admit, the costs, etc.—See as to costs after neglect to give notice, or to admit upon notice, R. 136 (*post*).

A party who proposes to adduce a document in evidence is bound, therefore, in every case, in order to entitle himself to the costs of proving it, to give a notice to admit, that the other party may have an opportunity of admitting it, and thus saving costs. And this rule applies to documents the validity of which is directly in issue : *Spencer v. Barough*, 9 M. & W. 425, where the attorney on the other side, when applied to, had refused to admit, on the ground that the document was a forgery.

The court will rather enlarge than restrict the provisions of the section : *per Alderson, B.*, in *Rutter v. Chapman*, 8 M. & W. 388. So, where plaintiff's attorney was in possession of a probate of a will essential to the defendant's case, and on being called upon to give an undertaking to produce it, refused to do so, and the defendant then warned him that an exemplification of the will must be procured at a heavy expense, it was held that the defendant, who obtained the verdict, was entitled only to the expense of an ordinary copy, as he might have called on the plaintiff to admit a copy : *Goldstone v. Tovey*, 6 N.C. 274.

The costs of proving a document which is not admissible in evidence will not be allowed : *Phillips v. Harris*, 1 Car. & M. 492 ; nor where the proof of the documents is not to the satisfaction of the judge : *Doe d. Peters v. Peters*, 1 Car. & K. 279.

Unless at the trial the judge certifies.—As to obtaining the judge's certificate, see *Day v. Vinson*, 33 L.J. Ex. 171.

The omission of a notice to admit will be excusable, when a saving of expense will be thereby effected, as where a party necessarily called to prove some other part of the case can prove the documents. See R. 136 (*post*).

These provisions apply to every document a party means to adduce in evidence and are not confined to documents in his custody or control : *Rutter v. Chapman*, 8 M. & W. 388 ; in which case the cost of proving signatures to a petition for a charter under 1 Vic. c. 71, s. 49, were not allowed, no notice to admit having been given.

A notice signed by the plaintiff's attorney, calling on the defendant to admit a paper to be a copy of a conveyance, "made between J.P. of the one part, and the defendant of the other part, original to the possession of the said defendant," is some evidence for the jury of the existence of an executed conveyance to the effect mentioned : *Hinkle & wife v. Schonbein*, (1865) 4 S.C.R. 306.

Notice to admit not having been given, costs of proving documents are not allowed in the absence of the judge's certificate under this section : *Levy v. Smith*, (1886) 5 S.C.R. 400.

106. An affidavit of the attorney in the action or his clerk of the due signature of any admissions made in pursuance of such notice and annexed to the affidavit shall be sufficient evidence of such admissions. Proof of admissions.
17 Vic. No. 21, s. 93.

Any admissions.—The admission, if made, will, of course, be either generally of the documents mentioned in the notice, or of some one or more of them. The admission may be indorsed on or subscribed to the notice.

Such notice.—Care should be taken in examining the terms of the notice and of the admission sought ; and particularly that there be the proper reserve of all just exceptions : *Chaplin v. Levy*, 9 Exch. 531.

Where a plaintiff was nonsuited in consequence of the defendant's counsel refusing to admit certain documents, which had been agreed to be admitted, a new trial was granted on the ground of a breach of good faith, with costs to be paid by the defendant : *Doe d. Tindal v. Roe*, 5 Dowl. 420.

107. An affidavit of the attorney in the action or his clerk of the service of any notice to produce, in respect of which notice to admit has been given, and of the time when it was served, with a copy of such notice to produce annexed to such affidavit, shall be sufficient evidence of the service of the original of such notice and of the time when it was served. Proof of notice to produce.
Ibid. s. 94.

**C.L.P. Act,
S. 107.**

Notice to produce.—An enumeration of the cases in which it is necessary to give a notice to produce, forms a part of the law of evidence ; as does the statement of the amount of proof of possession by the party who has the original document which is required, in order to make secondary evidence thereof admissible. The object of the notice is merely to give the opposite party sufficient opportunity to produce the document if he pleases ; and not that he may be enabled to prepare evidence to explain, nullify or confirm it : *Dwyer v. Collins*, 7 Exch. 639 ; 21 L. J. Ex. 225.

Form of notice.—The notice should be in writing, and entitled in the cause, and should specify the document sufficiently for the information of the party to whom it is addressed. The words "all and every letters written by the plaintiff to the defendant, and relating to the matters in dispute of the action," were held sufficient to let in secondary evidence of a particular letter of which the date is not specified : *Jacob v. Lees*, 2 M. & Rob. 33 ; *Conybeare v. Farries*, L.R. 5 Ex. 16 ; and "all accounts relating to the matters in question in this cause" was held sufficient to let in secondary evidence of an account for work done, which had been delivered to the defendant and admitted by him to be correct, though no dates were specified : *Rogers v. Constance*, 2 M. & R. 179. Notice to produce a letter purporting to enclose an account is sufficient notice to produce the account : *Engall v. Druce*, 9 W.R. 536.

When it was served.—What will constitute a sufficient service of notice is a question for the judge at the trial. It should be served on the attorney or agent : *Houseman v. Roberts*, 5 C. & P. 394 ; or on the party himself : *Hughes v. Budd*, 8 Dowl. 315 ; and the sufficiency of the time allowed to search for the documents, the production of which is required, will generally depend on the facts of each case. It should be given within a reasonable time before the trial : *George v. Thompson*, 4 Dowl. 656 ; and the night before the trial is not generally a reasonable time : *Atkins v. Meredith*, 4 Dowl. 658 ; though if it were to produce a document shown to be in the possession of the attorney, it would be sufficient : *Lloyd v. Mostyn*, 2 Dowl. N.S. 476 ; even if the service is in the evening, at the office of the attorney : *Leaf v. Butt*, 1 Car. & M. 451 ; and on one of his clerks, if he has the management of the cause : *Gibbons v. Powell*, 9 C. & P. 634.

Sufficiency of notice.—Three days' notice to produce letters which had been used in a chancery suit six years before the trial : *Sturge v. Buchanan*, 10 Ad. & E. 598, two days' notice to the attorney to produce documents, the party himself being abroad : *Bryan v. Wagstaff*, 2 C. & P. 126, have been held sufficient. A notice to produce, served on the commission day, the attorney having left his office for the assizes : *George v. Thompson*, 4 Dowl. 656 ; a notice served on the evening before the trial on the defendant's attorney at his residence, twenty miles from the place of trial, where the defendant resided in the same town with the attorney, but was not at home till midnight : *Howard v. Williams*, 9 M. & W. 725 ; a notice served at the office of the attorney on a woman who took care of the chambers, the evening before the trial : *Sims v. Kitchen*, 5 Esp. 46, were all held insufficient. A notice to produce served in the assize town is, in general, insufficient : *Foster v. Pointer*, 9 C. & P. 718 ; and see *Coombs v. Bristol and Exeter Ry. Co.*, 1 F. & F. 206.

Where a document is in court at the time of the trial, a notice to produce it then is sufficient : *Dwyer v. Collins*, 7 Ex. 639 ; 21 L. J. Ex. 225.

A document was called for under a notice to produce ; a document was thereupon produced, which the other side denied to be the document called for ; *Byles, J.*, held that he must decide that question, before he admitted secondary evidence : *Froude v. Hobbs*, 1 F. & F. 612.

It may be observed that a notice to produce given for one trial need not be repeated in the case of a new trial : *Hope v. Beadon*, 2 L.M. & P. 593 ; 21 L. J. Q.B. 25.

The judge at the trial has the exclusive cognizance of determining whether notice to produce is necessary or not : *Port Jackson S.S. Co. v. Mayers*, (1888) 9 N.S.W.R. 470.

PART IX.

CHANGE OF VENUE.

Change of
venue.
4 Vic. No. 22,
s. 15.

108. In any action or other proceeding, wheresoever pending—

(a) if it appears that a fair or unprejudiced trial of any issue cannot otherwise be had ; or

- (b) if for any other reason it appears expedient to the Court **C.L.P. Act,
S. 108.**
so to do,

the Court may change the venue and direct the trial to be had in such other district or at such particular place as the Court thinks fit, and may for that purpose make all such orders, and (where the venue is changed at the instance of either party) impose such terms and conditions as justice appears to require.

Under this section the power of changing the venue is given to the court only, and "Court" under the interpretation section means the Supreme Court of New South Wales, but acting under the general power given them by section 268 (*post*), the judges have made rules on this question (RR. 116, 117), under which the application is usually made to a judge on summons.

Applications under this section and under the rules made in connection with this section have been made so often and the principles so thoroughly thrashed out in our own courts, that it is thought necessary here only to give references to cases decided here.

In any action.—This is very general, but ejectment is specially dealt with in the next following section.

The plaintiff, generally speaking, has a right to lay his venue where he thinks proper, and where the plaintiff has not exercised a capricious choice, the defendant, who seeks to deprive him of an undoubted right, must show that there will be a practical preponderance of convenience in trying the case in a place other than where the plaintiff has elected to have it tried: *Jacob v. Bolding*, (1872) 11 S.C.R. 174. But see *Fowler v. Kenna*, *infra*. In all such applications the affidavit in support should disclose: (1) the nature of the defence; (2) the number of witnesses proposed to be called; (3) the nature of the evidence they can give (see a considered judgment of *Cohen, J.*, in the case of *Beirne v. Pearse*, (1898) 15 W.N. 53, where he goes very fully into the effect of the English decisions on the subject. This applies to all applications for a change of venue, whether made by the defendant or the plaintiff: *Dillon v. Quinlan*, (1899) 16 W.N. 69.

A fair and unprejudiced trial.—Where applications are either made or objected to on the ground that the persons likely to be chosen as jurors in the locality in which it is proposed to lay the venue would in all probability be prejudiced in favor of one side or other, the judges will not listen to any such general charge, there must be some special allegation, supported by affidavit. Thus in an action for malicious prosecution, where both the parties lived at Tarago, about 20 miles from Goulburn, an application to change the venue from Sydney to Goulburn was objected to on behalf of the plaintiff, on the ground that the defendant was a grazier and that most of the jurors summoned would be graziers. The objection was overruled, the allegation being too general, and the application granted: *Hennessy v. Badgery*, (1884) 1 W.N. 34. See also *Commercial Bank v. Gibson* (*ibid.*) 33; and *Piercy v. Baker*, (1887) 4 W.N. 60.

An application on this ground was granted in the case of *Cooper v. Rutherford*, (1887) 4 W.N. 8. In that case the venue had originally been laid in Sydney, but had been changed on the application of the defendant to Bathurst. The trial took place and resulted in a verdict for the defendant. This verdict was set aside by the Full Court as being demonstrably wrong, and an application on behalf of the plaintiff to have the venue restored to Sydney granted.

For any other reason.—The usual ground for making an application of this nature is that the balance of convenience will lie in having the case tried in a place other than that selected by the plaintiff, and this may be the result of various causes.

In an action for damage caused by trespass by sheep on plaintiff's station near Hillston, twenty necessary witnesses living close to Hillston, an application to change the venue from Sydney to Hay was granted: *Brewer v. Whittingham*, (1884) 1 W.N. 37; but in an action for libel published in a Murrumbidgee newspaper, an application to change the venue from Sydney to Dubbo, on the ground that defendant and nine necessary witnesses lived at Coonamble, was refused with costs: *Tobin v. Grimshaw* (*ibid.*), 91.

Unless for some very strong reason the court, as a rule, will grant applications to send country cases, set down for Sydney, back to the country, the Sydney cause list being generally over-burdened with cases. In *Fowler v. Kenna*, (1884) 1 W.N. 15, *Windeyer, J.*, in granting such an application said: "If country attorneys will

C.L.P. Act, s. 108. persist in bringing their cases down to Sydney, application to send them back will be granted with costs." This case was followed in *O'Donoghue v. Oliphant*, (1901) 18 W.N. 117.

Delay.—An application to transfer the venue from Maitland to Tamworth on the ground that defendant and his witnesses resided only 25 miles from Tamworth, but 140 miles from Maitland, was refused, as it would delay the trial for six months: *Shanahan v. Cohen*, (1884) 1 W.N. 53.

In *Brown and another v. The Commissioner for Railways*, (1886) 3 W.N. 40, an application to change the venue from Maitland to Sydney, on the ground that the case would last a long time was refused, the balance of convenience being in favour of trying it at Maitland, where all the witnesses lived.

Change of venue from Sydney to Maitland was refused in an action for libel by an M.L.A., where the circumstances demanded the fullest publicity: *Griffith v. Johnson*, (1902) 19 W.N. 225.

Penal actions.—In penal actions the Crown has not the prerogative of laying the venue where it pleases: *Attorney General v. Hamilton*, (1894) 10 W.N. 195.

View.—The fact that a view would assist the jury in the determination of the issues is a ground for changing the venue: *Budge v. Britten*, (1902) 18 W.N. 240.

Time for application.—The application is usually made after issue joined. It may be made too late, as after notice of trial under s. 111: *Dillon v. Quinlan*, (1899) 16 W.N. 69; or where, under the circumstances, great delay would be caused: *Shanahan v. Cohen* (*supra*); or where time to plead has been given on the usual terms: see *Gibbs v. Kellett*, (1883) T.T.R. 147.

Costs.—Ordinarily costs of the application, if granted, are costs in the cause, as in *Budge v. Britten* (*supra*); but the order is made with costs where the venue is regarded as originally wrongly laid, as in *Fowler v. Kenna* (*supra*). If plaintiff applies he may be ordered to pay costs: *Bourke v. Tindale*, (1884) 1 W.N. 38.

Change of
venue in
ejectment.

17 Vic. No. 21,
s. 133.

109. The Court or a Judge may, on the application of either party to an action of ejectment, order that the trial shall take place in any district other than that in which the venue is laid, and such order being suggested on the record the trial may be had accordingly.

Action of ejectment.—The principle upon which the venue in actions of ejectment is laid is practically the same as that in all other actions. The venue in actions of ejectment is not local, and, therefore, it resolves itself into a question of the balance of convenience: *Bank of N.S.W. v. Coman*, (1892), 9 W.N. 69. See also *Beirne v. Pearse*, (1898) 15 W.N. 53.

PART X.

COUNTERMAND OF TRIAL OR DEFAULT IN PROCEEDING THERETO.

Rule for costs of
the day.

Ibid. s. 89.

110. A rule for costs of the day for not proceeding to trial pursuant to notice, or not countermanding in sufficient time, may be drawn up on affidavit without motion.

A rule for costs of the day.—See R. 123 (*post*).

"Costs of the day" are the same as those which are paid on a withdrawal of the record: *Walker v. Lane*, 3 Dowl. 504; and if the cause has been made a *remanet* from one sittings to another, the "costs" are the "costs of the day" of the second sittings when the default took place: *Brett v. Stone*, 1 D. & L. 140.

Payment of the costs.—Payment of the costs may be enforced by execution upon the Master's *allocatur*, under the Judgment Creditors Remedies Act, 1901, s. 3 (*post*): *Hodgson v. Paterson*, 2 Dowl. N.S. 129. Formerly the payment of the costs of the day would not be made a condition precedent to further proceedings, unless under peculiar circumstances; as where the plaintiff was a pauper, and resident out of the jurisdiction: *Cross v. Port of London Insurance Co.*, 6 D. & L. 250; 18 L.J. Q.B. 2; see R. 362 (*post*).

Excuse for not going to trial.—This section does not “give costs,” it merely regulates the mode of obtaining them. The costs are not given, as a matter of course. The plaintiff may have reasonable excuse for not proceeding to trial: *Pell v. Linnell*, L.R. 3 C.P. 441, 443, *per Bovill*, C.J. The rule is, however, of course, so that if the plaintiff has any good excuse for not having gone to trial, he must move the court to discharge the rule. A proposal to refer, made after the commission day, will be no excuse: *Eaton v. Shuckburgh*, 2 Dowl. 624. In one case: *Mullins v. —*, 5 Taunt. 88, he was considered justified in withdrawing the record, on the ground that the jury was prejudiced. In another case, an accident to a material witness was held a sufficient excuse for not trying: *Ogle v. Moffatt*, Barnes, 133; and the necessary absence of a material witness has been held a good excuse for not going to trial: *E. Union Ry. Co. v. Symonds*, 4 Exch. 502. In another case the plaintiff withdrew the record on account of the absence of a witness, on being told that the cause might be re-entered for trial before twelve o'clock; the defendant then entered a *ne recipiatur*, and on the witness appearing, the plaintiff offered to try, but the defendant refused to consent; the court refused the defendant the costs of the day: *Pope v. Fleming*, 5 Exch. 249. The death of one of two defendants is good excuse for not trying, if no suggestion of the death has been entered on the record: *Pell v. Linnell* (*supra*). *Quare* whether the bankruptcy of the plaintiff will be considered an excuse for not trying, as it was formerly a reason for discharging a rule for judgment as in a case of a nonsuit, or entering a *stet processus*. See further as to excuse for withdrawing record: *Greenway v. Holmes*, 2 C.L.R. 745.

**G.L.P. Act,
S. 110.**

So also it has been held in our own courts, that the fact of the defendant being in gaol is not a sufficient excuse for postponing the trial of a civil action: *Fowler v. Kenna*, (1884) 1 W.N. 129.

In *Lucas v. Meagher*, (1896) 13 W.N. 67, where the plaintiff, who intended to appear in person, was absent when the case was called on, owing to its coming on unexpectedly, the court allowed the plaintiff's father to apply for an adjournment, and granted it on the father's undertaking to pay the costs of the day.

A defendant is not entitled to costs of the day when the cause was struck out owing to the absence of both parties: *Morgan v. Fernyhough*, 11 Exch. 205; 25 L.J. Ex. 52, or owing to the defendant, although present, having neglected to have the jury sworn and to claim a nonsuit: *Leech v. Gibson*, 10 W.R. 354, Ex., H.T. 1862; *Smith v. Marshall*, 33 L.J. Q.B. 332, even though the plaintiff was under terms to try: *Warne v. Hill*, 7 C.B., N.S. 726; 29 L.J. C.P. 201. All objections to the allowance of these costs should be taken before the prothonotary upon the taxation, and not reserved *sub silentio* for a subsequent application to the court: *Rainforth v. Hamer*, 3 C.L.R. 298.

A defendant is not entitled to costs of the day, under this section, when the plaintiff has been prevented from proceeding to trial by an order changing the venue, even when the order is made on the plaintiff's application: *Hooper v. Barnett*, 22 W.R. 575.

Quare: Whether it is necessary to make an order of a judge, trying issues, directing payment of the costs of the day by the plaintiff, a rule of court in order to enforce it by attachment: *Raunsley v. The Municipality of Hay*, (1880) 1 N.S.W.R. 346.

Special circumstances may entitle a defendant to the costs of instructions for brief, drawing and copy, although no notice of trial has been given: *Shepherd v. St. Baker*, (1881) 2 N.S.W.R. 129.

The plaintiff in an action where there is an attorney on the record cannot give notice of trial in person: *Keisor v. Ponder*, (1886) 2 W.N. 112.

On affidavit.—It is sufficient if the affidavit show a default in not proceeding to trial pursuant to notice and not countermanding in due time, and it need not show that costs have actually been incurred by the defendant: *Powell v. James*, 12 M. & W. 100.

111. (1) Where any issue is joined in any action, and the plaintiff neglects to bring such issue on to be tried according to the practice for the time being of the Court, whether the plaintiff in the meantime has given notice of trial or not, the defendant may give twenty days' notice to the plaintiff to bring the issue on to be tried at the sittings or assizes, as the case may be, next after the expiration of the notice.

Proceeding where plaintiff neglects to bring on the cause to be tried.
17 Vic. No. 21, s. 91.

**C.L.P. Act,
S. 111.**

(2) If the plaintiff afterwards neglects to give notice of trial for such sittings or assizes, or to proceed to trial in pursuance of the said notice given by the defendant, the defendant may suggest on the record that the plaintiff has failed to proceed to trial although duly required so to do (which suggestion shall not be traversable but only be subject to be set aside if untrue), and may sign judgment for his costs.

(3) Provided that the Court or a Judge may extend the time for proceeding to trial with or without terms.

Where any issue is joined.—Issue must have been joined, but the issue need not have been delivered: *Heath v. Boxall*, 7 Dowl. 16. Issue must be joined as to all the defendants who plead, if there be several: *Jackson v. Utting*, 2 Dowl. N.S. 543; at least, as to those who are alive; for if one or more of several defendants die, their deaths must be suggested: *Pinkus v. Sturch*, 5 C.B. 474.

And the plaintiff neglects.—As to setting a case down for trial, see RR. 99, *et seq.* (post).

When the plaintiff must proceed.—The time from which the plaintiff's delay will commence running will not begin till the last issue is joined, if there are several: *Crowther v. Duke*, 7 Scott, 409. If there are issues in law, the plaintiff is not bound to go to trial until these issues are determined: *Chrisp v. Attuelli*, 1 L.M. & P. 454, unless otherwise ordered under s. 89. If the plaintiff's proceedings have been stayed by an injunction, he is bound to go on as soon as the injunction is dissolved: *Dobson v. Brocklebank*, 7 Exch. 316; 21 L.J. Ex. 96. This section applies where plaintiff has proceedings pending at law and in equity, and elects to proceed in equity: *Mortimore v. Soares*, 1 E. & E. 399; 28 L.J. Q.B. 133.

Neglect of plaintiff.—Where a plaintiff has proceeded at law and in equity, and has elected to proceed in equity after issue joined in the action, the defendant may, under this section, give notice to the plaintiff to bring the issue on to be tried; and if the plaintiff neglects to do so, the defendant may enter a suggestion on the record and sign judgment for his costs: *Mortimore v. Soares*, 1 E. & E. 399; 28 L.J. Q.B. 133.

Where the defendant had applied at chambers to put off the trial, and the hearing had been postponed, so that the commission day was close at hand, it was considered that the plaintiff was justified in countermanning; and that there was no neglect on his part: *Rendell v. Bailey*, 2 Dowl. 113. So if the plaintiff countermans his notice of trial, or does not proceed to trial, at defendant's request, there is no neglect on his part: *Jenkins v. Charity*, 2 Dowl. 197; *Doe d. Steppins v. Lord*, 2 Dowl. 419. So there is no neglect of the plaintiff if the defendant in any way consents to the delay: *Grey v. Hutchings*, 3 Dowl. 414, as by negotiating for a settlement: *Alford v. Fellows*, 9 Dowl. 326.

The section applies, although there has been an abortive trial: *Cohen v. Amos*, (1885) 6 N.S.W.R. 184; 2 W.N. 17.

The defendant may give twenty days' notice.—The notice is now *eight* days instead of *twenty*, but where the plaintiff, or any plaintiff, if there be more than one, resides above 100 miles from Sydney, *twelve* days; where above 200 miles, *sixteen* days: R. 124 (post).

Suggestion.—The suggestion to be entered by the defendant under this section cannot be entered while the record is imperfect, as if the plaintiff has died since default made in going to trial. In such case a suggestion of the death must be first entered: *Larchin v. Buckle*, 1 L.M. & P. 740. So if any of several defendants have died since the writ issued, the record must show the issue had been completely joined at the time of the plaintiff's default: *Pinkus v. Sturch*, 5 C.B. 474.

And may sign judgment for his costs.—On the 11th May the defendant gave the plaintiff eight days notice to proceed under this section. On the 25th of May, the plaintiff not having set the case down for trial, the defendant signed judgment. The sittings next after the expiration of the notice began on the 5th of June. Held, that judgment was signed too soon, as the plaintiff could set the case down at the June sittings: *N.S.W. Mining Bank v. Argles*, (1893) 9 W.N. 172; and see also *Sunny Corner Silver Mining Co. v. Morgan*, (1884) 1 W.N. 91.

In *Herbert v. Municipal District of Manly*, (1900) 21 N.S.W.R. 373; 17 W.N. 197, the plaintiff having neglected to bring the issue on to be tried, the defendants on the 15th June, gave the plaintiff notice under this section to proceed to trial at the next sittings (Aug.-Sept.). The plaintiff gave notice of trial for the last day of

the sittings. On that day the case was not on the list and was a *remanet*. The defendants then entered a suggestion that the plaintiff had neglected to proceed to trial in pursuance of the notice, and signed judgment. *Held*, that judgment must be set aside. The plaintiff complied with the notice so long as he gave notice of trial for any day during the sittings. **C.L.P. Act, S. 111.**

Judgment of *non pros.* was set aside on terms where there was a defect in the notice to proceed to trial, the words, "at the sittings" being omitted: *Murray v. Fowler*, (1889) 6 W.N. 1.

Provided that the court or a judge may extend the time.—The plaintiff may apply for an extension of the time after notice, but before the suggestion is entered by the defendant; and this is the better course: *Farthing v. Castles*, 22 L.J. Q.B. 167, B.C. A judge has a *discretionary* power to extend the time even though the application be made for that purpose after the twenty days have expired: *Nosotti v. Hudson*, L.R. 3 C.P. 293, but in a case where the suggestion had been entered and judgment signed by the defendant, *Martin, B.*, declined to exercise the power: *Horner v. Spencer*, 1 F. & F. 412.

And it has been decided in our own courts that the court or a judge has no power to extend the time for proceeding to trial under this section after the time so limited by the notice has expired: *Lasarus v. Meagher*, (1886) 2 W.N. 106.

Where the defendant has given the plaintiff notice under this section to proceed to trial, the time for so proceeding will not be extended where the defendant has had the action hanging over his head for a long time through the plaintiff's negligence: *Blackwood v. Nelson*, (1886) 3 W.N. 33.

In *Ellis v. South British Insurance Co.*, (1891) 8 W.N. 22, the plaintiff had leave to appeal to the Privy Council from an order granting a new trial; the defendants to be at liberty to proceed upon the order appealed from on giving security. *Held*, that without giving such security the defendants could not give the plaintiff notice to proceed to the second trial.

It may be difficult to apply this section, when the venue has been changed after issue joined, and (*semble*) an application by the plaintiff for a change of venue is too late after notice by the defendant to bring the case to trial under this section: *Dillon v. Quinlan*, (1899) 16 W.N. 69.

As to the mode of proceeding if the plaintiff becomes bankrupt, see Bankruptcy Act, 1898, s. 10 (7).

PART XI.

PROCEEDINGS AT THE TRIAL.

112. The Court or Judge may at the trial of any action where they or he may deem it right for the purposes of justice order an adjournment for such time, and subject to such terms and conditions as to costs and otherwise, as the Court or Judge thinks fit. **Adjournment. 20 Vic. No. 31, s. 9.**

A new trial may be granted where one party is taken wholly by surprise by his adversary's case: *Roberts v. Holmes*, 2 C.L.R. 726. So a deficiency in proof may occur; and if it occur from other causes than the negligence of the party on whose part the failure arises, in getting up his proof, an adjournment may be allowed. A postponement was formerly granted: *Thompson v. Lewis*, 2 C.L.R. 707, when a necessary witness was absent, if it was applied for on proper affidavits, before the trial began. Such a "deficiency in proof" it would seem is now a good ground for an application for an adjournment.

Where a party hesitated at the trial to consent to a reference of all matters in difference, *Willes, J.*, intimated that unless the necessary consent was given he would adjourn the trial of the cause until the next assizes: *Jones v. Beaumont*, 1 F. & F. 336.

The circumstances in, and the terms upon, which an adjournment may be granted are in the discretion of a judge.

To whom made.—By R. 112 (*post*), applications to remove a cause from any cause list, or to postpone the trial of a cause are to be made to a judge in chambers. In *Cox v. Cox*, (1893) 9 W.N. 184, an application to the court was dismissed with costs, on the grounds that it should have been made in chambers.

**C.L.P. Act,
§. 112.**

Grounds.—By the same R. 112, where the ground is the absence of a witness, there must be an affidavit stating the matters which he is expected to prove.

By plaintiff.—An application by *plaintiff* for a postponement to *other sittings* is usually unnecessary, as he may have the effect of such an application by withdrawing the record; though in *Griffin v. Thompson*, (1884) 1 W.N. 71, application of a plaintiff was granted, payment of costs being made a conditional precedent, and an application to vary the latter portion of the order was refused.

In *Goldsbrough v. MacMahon*, (1887) 3 W.N. 119, application to postpone the hearing of a new trial motion till after the prosecution of certain witnesses, was refused, the court saying it would be a dangerous precedent to postpone civil proceedings on such a ground.

For the general practice see Chitty's Archbold, 1488 *et seq.*

Costs.—The costs are in the discretion of the judge: see *Griffin v. Thompson*, 1 W.N. 71.

Addresses by
counsel.
20 Vic. No. 31,
s. 58.

113. In every action the defendant's counsel may reserve his address to the jury, if he thinks fit so to do, until the close of the evidence for the defendant, and the right to reply shall be the same as at present.

Addresses by
counsel.
Ibid. s. 59.

114. When the address to the jury on the part of the defendant is reserved as aforesaid, the evidence in reply, if any, on the part of the plaintiff must be given before such address.

Addresses by
counsel.
Ibid. s. 60:

115. Where the counsel for the defendant begins, the counsel for the plaintiff may reserve his address to the jury in like manner and subject to the same conditions as hereinbefore provided with respect to the counsel for the defendant.

As to the right to begin, see R. 146 (*post*).

The order of beginning has been decided to be a matter for the disposal of the judge at *Nisi Prius*; and an incorrect ruling as to the proper party to begin is no ground for a new trial, unless the ruling "did clear and manifest wrong": *Brandford v. Freeman*, 5 Exch. 734; see also *Ashby v. Bates*, 15 M. & W. 589; and *Doe d. Bather v. Brayne*, 5 C.B. 655.

The right to begin ordinarily accompanies the *onus probandi*. *Ei incumbit probatio qui dicit, non qui negat*: and the rule commonly given is that that side shall begin which would be entitled to a verdict if no evidence were given on either side: *Amos v. Hughes*, 1 M. & Rob. 464; *Soward v. Leggatt*, 7 C. & P. 613; *Geach v. Ingall*, 14 M. & W. 95; *Leete v. Gresham Insurance Co.*, 15 Jur. 1161; and in all cases where the plaintiff may recover damages of unascertained amount, he is, notwithstanding the proof of the *issues* may rest upon the defendant, entitled to begin, in strict accordance with this principle: *Mercer v. Whall*, 5 Q.B. 447, 461; thus, in an action for negligence where the only plea was one of accord and satisfaction, the plaintiff was held, by *Martin, B.*, to be entitled to begin: *Pim v. E. Counties Ry. Co.*, 2 F. & F. 133. The whole of plaintiff's demand, as shown by his particulars, being admitted by defendant, defendant begins: *Mossman v. A.S.N. Co.*, (1873) 12 S.C.R. 63.

The most general criterion, however, that can be given as to the right to begin collected from all the cases on the subject, is that "he begins who, in the absence of proof on either side, would substantially fail in the action." This rule includes those actions for unliquidated damages noticed above, in which the plaintiff must give some evidence in order to get substantial damages, although he would, if no evidence were given on either side, be entitled to a verdict for a nominal amount, for such verdict would be a substantial failure. See 45 *Law Times*, pp. 196, 219, on *The right to begin*.

See *A. J. S. Bank v. Bank of N.Z.*, (1890) 6 W.N. 172; *Moore v. Petersen*, (1879) 2 S.C.R., N.S. 111, where it was held that plaintiff in an action against several defendants has the right to begin, although as to one of the defendants he might not have had that right on the pleadings of that defendant alone.

116. (1) In all cases of variance between the proof and the record on the trial of any action, the Court or Judge or Circuit Court, instead of causing the record or document on which such trial is proceeding to be amended at such trial, may direct the jury to find the fact or facts according to the evidence.

C.L.P. Act, S. 116.

Variances between proof and record.
5 Vic. No. 9, s. 38.

(2) Such finding shall thereupon be stated on the said record or document, and, notwithstanding the finding on the issue or issues joined, the Court shall thereafter, if it appears to the Court that the variance was immaterial to the merits of the case and such as could not have prejudiced the opposite party in the conduct of the action or defence, give judgment according to the right and justice of the case.

Section 260 (*post*) gives the court or a judge or any Circuit Court power to amend "all defects and errors in any proceeding in civil causes" at all times, and it goes on to enact that "all such amendments as are necessary for the purpose of determining in the existing suit the real question in controversy between the parties, shall be so made." So that the procedure under the above section, if not entirely superseded, would be very seldom used.

PART XII.

REMITTING ISSUES AND INQUIRIES TO SUBORDINATE TRIBUNALS.

117. Where, in any action, the claim endorsed on the writ—

(a) does not exceed two hundred pounds; or

(b) though it originally exceeded two hundred pounds, is reduced by payment into Court or an admitted set-off or otherwise to a sum not exceeding two hundred pounds,

a Judge may, on the application of either party after issue joined or after any interlocutory judgment, if he thinks the action proper to be tried in a District Court, on such terms as he thinks fit, order that the action be tried in any District Court which he shall name.

Order for trial in District Court.

22 Vic. No. 18, s. 98.

22 Vic. No. 25, s. 2.

In any action.—The words in the corresponding English section are "any action of contract." It has been held that the words of our Act are sufficiently large to include actions of contract, where the demand is unliquidated, and actions of tort: *Wells v. Delaney*, (1887) 3 W.N. 120.

The claim . . . does not exceed two hundred pounds.—See *Cook v. Duncan*, (1887) 4 W.N. 16, where an application under this section was refused, as the claim together with the interest would exceed £200.

A Judge . . . may order.—If the application is made for purposes of delay, it will not be granted; see *Eather v. Nowland*, (1884) 1 W.N. 80.

If he thinks the action proper to be tried in a District Court.—Subject to the provisos mentioned in the section, and if the application is not made from some improper motive, such as delay: *Heininger v. Reed*, (1903) 20 W.N. 31; the only condition necessary in order that the order may be made, is that the judge should be satisfied that the action is one proper to be tried in the District Court. So an application, under this section, although incidentally involving a change of venue, need not be supported by affidavits stating the number of witnesses, and the nature of their evidence: *Dang Chee v. Shee Huey*, (1900) 16 W.N. 153; and see *Day v. M'Coy*, (1885) 1 W.N. 113.

On such terms as he thinks fit.—An order removing a cause from the Supreme Court to the District Court is not bad for ordering the cause to be tried "at the present sittings" of the District Court. Such an order does not control the discretion of the District Court judge in fixing a day for the trial of the cause: *Dickson v. Eyles*, (1880) 1 N.S.W.R. 203.

**C.L.P. Act,
S. 117.**

It was held in *Norton v. Ricketson*, (1893) 14 N.S.W.R. 343; 9 W.N. 183; 10 W.N. 43, that on an application to remit a Supreme Court action to the District Court, a judge cannot, as against the respondent, order that the cause is to be tried without a jury, though (*semble*) such a term may be imposed on the applicant.

Any District Court.—See *Keys v. Hindmarsh*, (1892) 9 W.N. 26.

Appeal.—No appeal lies to the court from an order made under this section by a judge. Where a statute gives a power to be exercised by a judge, and not by a judge or the court, the power so given must be exercised by the judge only, the court has no jurisdiction either to exercise the power in the first instance, or to interfere by appeal with the order made by the judge, unless such appeal is expressly given: *Ex parte Jones*, (1874) 12 S.C.R. 284; but see *Norton v. Ricketson* (*supra*), where, a judge having made an order under the section, which he had no power to make, an appeal lay, and the order was varied.

Proceedings
therein.

22 Vic. No. 18,
s. 98.

118. The plaintiff shall thereupon lodge such order and the issue or the writ for the assessment of damages with the registrar of such District Court, and the Judge of such District Court shall appoint a day for the hearing of the action, notice whereof shall be sent by such registrar to both parties or their attorneys in the manner directed by the rules regulating practice in the District Courts.

Though no time is fixed for notice of trial of a Supreme Court issue in the District Court, the plaintiff must give notice a reasonable time before the intended day of trial.

Where, therefore, a plaintiff gave notice on a Thursday, after the time fixed for demanding a jury, that the trial would take place on the following Saturday, and the defendant did not appear, the court set aside a verdict for the plaintiff and granted a new trial: *Oliver v. Sheppard*, (1877) Knox. 515.

Quære: Whether the notice of trial should be sealed (*ibid*).

When an order for the trial of a Supreme Court issue in a District Court has been obtained on the application of the defendant, the plaintiff has the carriage of the order, and it is his duty, within a reasonable time, to lodge the order, or a copy, with the Registrar of the District Court (*ibid*).

A District Court judge trying an issue in the Supreme Court, sent down to the District Court under a Judge's order, has power to find a verdict, under section 39 of this Act, against one of several defendants jointly sued. If the verdict be found for the plaintiff against one defendant simply, the Supreme Court can amend the judgment signed upon such verdict by entering judgment for the other defendants: *Bray v. Taylor*, (1877) Knox 201.

A judge of the District Court has exactly the same powers as a judge of the Supreme Court when trying a Supreme Court issue (*ibid*).

Certificate of
result and
judgment
thereon
Ibid.

119. After such hearing such registrar shall certify the result to the prothonotary of the Court, and judgment in accordance with such certificate may be signed in the Court.

Upon a motion on notice to set aside a nonsuit at the trial of a Supreme Court issue in the District Court, the notice being given after the time for filing a memorandum had expired. *Held*, that the proper course was to file a memorandum and apply for a rule nisi in the first instance, as in the case of a trial in the Supreme Court: *Moscrop v. Jacobs*, (1877) Knox 324; and see *Lewis v. McCafferty*, (1878) 1 S.C.R., N.S. 265.

The plaintiff sued the defendant in the Supreme Court, and after issue joined, an order was made by consent under this section, that the case be tried in the District Court. The plaintiff, when the case was called on, was absent from the court, and did not appear. The District Court Registrar gave a certificate that the case "has been heard in this court on this day, and the result was as follows:—Struck out, as plaintiff's witnesses did not appear when case called on." The defendant signed judgment as of nonsuit in the Supreme Court. A summons was taken out in chambers to set aside the judgment. *Held*, that the striking out of the case for want of witnesses did not amount to a nonsuit; judgment, therefore, set aside without costs: *Taylor v. McCulloch*, (1892) 9 W.N. 11.

On taxing the costs where an issue has been sent to the District Court, under these sections, the prothonotary has the same power of increasing counsel's fee as a District Court judge has in a District Court case; but the District Court judge has no such power in trying a Supreme Court issue: *Robinson v. Hazlewood*, (1889) 6 W.N. 16.

**C.L.P. Act,
S. 119.**

120. (1) Where in any action brought in respect of any trespass to land the defendant by his pleas has admitted the plaintiff's title to and possession of the land alleged to have been trespassed upon, the plaintiff may begin his action *de novo* for not more than two hundred pounds in the nearest District Court of the district in which the alleged trespasses have been committed, which commencement of action in the District Court shall operate as a stay of proceedings in the Supreme Court action.

Re-commencement of trespass action in District Court, where title and possession are admitted.
47 Vic No. 7, s. 3.

(2) In such District Court action the parties shall be bound by their pleadings in the Supreme Court action.

(3) All the costs incurred in the Supreme Court action up to such admission shall be costs in the cause to abide the event of the trial in the District Court.

(4) In any such action continued by the plaintiff in the Supreme Court after such admission, the plaintiff, if his verdict does not exceed two hundred pounds, shall recover only the same costs as he would have recovered in the District Court.

See on this section the note on Costs, s. 261 (*post*).

121. (1) By leave of a Judge there may be issued out of the Court at the instance of either plaintiff or defendant—

Writs of inquiry and trial.

(a) a writ of inquiry in any case where breaches have been suggested under the statute in such case made and provided; or

4 Vic. No. 22, s. 26.

(b) a writ of inquiry or writ of trial in any other case where the debt, damages, or sum sought to be recovered does not in fact exceed one hundred pounds (notwithstanding any higher amount or sum inserted in the declaration), and where the Judge is satisfied that no difficult question of law or fact will arise,

10 Vic. No. 10, s. 15.

15 Vic. No. 3, s. 11.

20 Vic. No. 8, s. 2.

directed to a commissioner of the Court, or the chairman of a Court of Quarter Sessions, or a barrister or attorney.

(2) The word commissioner hereinafter in this Part of this Act means the person to whom such writ is so directed.

See as to the English practice on writs of inquiry before the Sheriff, Chitty's Archbold, 996 *et seq*; see R.R. 148, 149 (*post*).

122. Such writ shall be issued under such Rules of Court as may be made for the determination of such matters in manner most conducive to the advantage of suitors and to the avoiding of expense and delay.

Rules of Court, 4 Vic. No. 22, s. 26.

See R.R. 148, 149 (*post*).

123. (1) Every such inquiry or trial shall be by such commissioner and two assessors to be named and summoned by him from among the class of special jurors residing within ten miles of the place where the inquiry or trial is to be had.

Hearing before commissioner and assessors. 5 Vic. No. 9, s. 20. 15 Vic. No. 3, s. 10.

C.L.P. Act,
S. 123.

Powers of
 Commissioner.

10 Vic. No. 10,
 s. 15.

(2) Every such commissioner shall for the purposes of such writ have the same powers as at the time of the passing of the Act tenth Victoria number ten were had or might have been exercised in England by the sheriff to whom a writ of trial was directed by one of Her Majesty's Courts or Judges at Westminster.

Verdict.

5 Vic. No. 9,
 s. 20.

124. The verdict of such commissioner and assessors or of the majority of them shall be of the like force as the verdict of a jury at *nisi prius*.

Commissioner's
 notes of evi-
 dence, &c.

10 Vic. No. 10,
 s. 17.

125. The commissioner shall return to the Court the writ with an indorsement of the verdict thereon, and his notes of the evidence on such inquiry or trial, and the Court or a Judge may permit any amendment of the said indorsement in accordance with such notes and not being repugnant to the verdict but so as to give effect to the same.

Judgment and
 execution.

5 Vic. No. 9,
 s. 20.

126. On the return of such writ the party succeeding may tax his costs and sign judgment and issue execution forthwith unless—

- (a) the commissioner certifies to the Court that in his opinion an opportunity should be afforded to the unsuccessful party to move for a new trial or inquiry (as the case may be); or
- (b) a Judge stays judgment or execution therein.

Setting aside
 verdict, &c.

10 Vic. No. 10,
 s. 17.

127. (1) Where justice appears to have been done by such verdict on the merits, the same shall not in any case be set aside or impeached for any mere omission to find any issue or for any technical defect or error whatsoever.

(2) Where any application is made to the Court or a Judge either to set aside such verdict or to amend the indorsement thereof on the writ, such reasonable terms may be imposed on the parties and such order made respecting the costs as the Court or Judge thinks fit.

Commissioner's
 and assessors'
 fees.

Ibid. s. 16.
 15 Vic. No. 3,
 s. 10.

128. (1) The commissioner's fee for executing a writ of inquiry or of trial shall be two guineas, which shall include the charge for summoning assessors and returning the writ duly indorsed.

(2) Each assessor shall be entitled to a fee of ten shillings as compensation for his attendance on any such inquiry or trial.

(3) The commissioner's and assessors' fee shall be allowed as costs in the cause.

Inquiry of
 damages before
 the protho-
 notary.

17 Vic. No. 21,
 s. 86.

129. (1) In any action in which it appears to the Court or a Judge after judgment by default that the amount of damages sought to be recovered by the plaintiff is substantially a matter of calculation, it shall not be necessary to issue a writ of inquiry but the Court or a Judge may direct that the amount for which final judgment is to be signed shall be ascertained by the prothonotary of the Court.

(2) The attendance of witnesses and the production of documents before the prothonotary may be compelled by subpœna in the same manner as before a jury upon a writ of inquiry. **C.L.P. Act, S. 129.**

(3) The prothonotary may adjourn the inquiry from time to time as occasion requires.

(4) The prothonotary shall indorse upon the rule or order for referring the amount of damages to him, the amount found by him, and shall deliver the rule or order with such indorsement to the plaintiff, and such and the like proceedings may thereupon be had as to taxation of costs, signing judgment and otherwise, as upon the finding of a jury upon a writ of inquiry.

Prothonotary—In the corresponding section in the English Act, the reference is to "one of the masters of the court," and in England it was formerly the practice to refer to the master the computation of the amount for which final judgment was to be signed in actions on bills of exchange, promissory notes and cheques; in actions on awards, in actions of covenant for rent, or for mortgage money, or for the arrears of an annuity. The cases are collected in a note to *Holdipp v. Otway*, 2 Wms. Saund. 107 (2).

In these actions, and in actions of a like nature, the writ may now, when the defendant is within the jurisdiction, be specially indorsed, under s. 24 (*ante*), upon which no inquiry is needed.

If the defendant resides out of the jurisdiction, there must always be an inquiry: ss. 18, 19 (*ante*).

The amount of damages . . . is substantially a matter of calculation.—Under the old practice in England, a reference to the Master was not ordered where the action was for an uncertain sum, and not a mere matter of figures; as on a foreign judgment: *Messin v. Lord Massareene*, 4 T.R. 493; on a bill of exchange for foreign money: *Maunsell v. Lord Massareene*, 5 T.R. 87; or on a bottomry bond: *Palin v. Nicholson*, Tidd. 589; on a covenant to indemnify, where it was open to the jury to inquire into questions of collateral satisfaction of the plaintiff's claims: *Denison v. Mair*, 14 East, 622; in an action on a judgment, interest being claimed as damages, when the jury (before the 1 & 2 Vic. c. 110, s. 17) were left to consider whether any and what damages should be given: *Nelson v. Sheridan*, 8 T.R. 395; and in an action for railway calls, where the reference to the Master was refused, and the case left to the jury by *Williams, J.*, on the ground that the matter was too involved and intricate: *Cheltenham Ry. Co. v. Fry*, 7 Dowl. 616.

In an action on a foreign judgment, or on a foreign bill of exchange, the damages are now held to be "substantially a matter of calculation." And if the defendant is within the jurisdiction, the writ may in such cases be specially indorsed under s. 24 (*ante*). In an action on a covenant, the propriety of an inquiry may depend on the nature of the covenant. The damages in an action for railway calls would seem to be substantially a matter of calculation; and the reason assigned in the report of the case above referred to, for leaving the inquiry to a jury instead of to the Master, is not very satisfactory.

The prothonotary's certificate of the amount of damages must be filed before final judgment can be signed, R. 171 (*post*).

For the practice under this section, see Chitty's Archbold, 994 *et seq.* The order will be made on summons; and the order and notice of the prothonotary's appointment for the hearing must be served in reasonable time.

PART XIII.

JUDGMENT AND EXECUTION.

130. In actions where the plaintiff seeks to recover a debt or liquidated demand in money, judgment by default shall be final.

Judgment by default for liquidated demands final.
17 Vic. No. 21, s. 85.

C.L.P. Act, S. 130. **Judgment by default shall be final.**—Judgment by default may be signed on non-appearance of the defendant, when the writ is specially indorsed, s. 25 (*ante*), and after declaration, for want of a plea, when the writ has not been so indorsed, s. 26 (*ante*).

The term judgment by default includes judgment by *nil dicit*, as after appearance for want of a plea, rejoinder, etc. : s. 73 (*ante*), and R. 57 (*post*).

This section does not apply to actions of debts within the 8 and 9 Will. 3 c. 11: see s. 132 (*post*).

As to setting aside a judgment on an affidavit of merits, see s. 25, n. (*ante*).

In *Beard v. Donaldson & another* (1893), 9 W.N. 102, the judge in chambers allowed two final judgments, signed on different days, each against a separate defendant, to stand, the point taken being that the earlier judgment should have been interlocutory only. In the same case it was held that there cannot be an interlocutory taxation of the costs of some of the issues in an action in which the plaintiff has succeeded until all have been disposed of : see also *Canty v. Gyll*, 4 M. & G. 907.

A final judgment in an action may be signed for the amount recovered, although costs are not taxed, and the amount of costs is left blank : *Martin v. Fletcher*, (1898) 14 W.N. 158.

Where there are two counts in a declaration to recover liquidated demands, and a plea is pleaded to one and not to the other, final judgment may be signed as to the latter, but the plaintiff cannot proceed to taxation as to it until the case is finally disposed of : *Booker v. McMahon and another*, (1898) 15 W.N. 2 and 94.

Where the amount sought to be recovered is unliquidated, interlocutory judgment will be signed, and either an inquiry had under s. 129 (*ante*), or the case set down for assessment of damages, in the same way as it is set down for trial : R. 4 (d) *post*.

Judgment for money demands without distinction between debt and damages.

17 Vic. No. 21, s. 87.

131. In all actions where the plaintiff recovers a sum of money, the amount to which he is entitled may be awarded to him by the judgment generally, without any distinction being therein made as to whether such sum is recovered by way of a debt or damages.

Saving as to certain provisions of 8 & 9 Wm. III, c. 11.

Ibid. s. 88.

132. Nothing in this Act contained shall in any way affect the provisions of the Imperial Act eighth and ninth William the Third, chapter eleven, intitled “*An Act for the better preventing frivolous and vexatious suits*,” as to the assignment or suggestion of breaches, or as to judgment for a penalty as a security for damages in respect of further breaches.

See *Roberts v. Marriott*, 21 Car. II; 2 Wms. Saund. 187 (2) *et seq.*

For the provisions of 8 and 9 Wm. III, c. 11, see Bullen & Leake, 3rd ed. p. 115.

Incipitur of judgment.

Ibid. s. 158.

133. It shall not be necessary before issuing execution upon any judgment under the authority of this Act to enter the proceedings upon any roll, but an incipitur thereof may be made upon paper shortly describing the nature of the judgment, and judgment may thereupon be signed, and costs taxed and execution issued :

Provided nevertheless that the proceedings may be entered upon the roll whenever the same may become necessary for the purpose of evidence or of an appeal.

To enter the proceedings.—See as to entering proceedings, RR. 173, 174 (*post*), and note to s. 156 (*post*) as to entry of judgment after death of a party after verdict.

In *Martin and another v. Fletcher*, (1898) 14 W.N. 158, the plaintiffs recovered a verdict, and eight days having elapsed, signed judgment by filing an incipitur in the usual form, containing the amount of the verdict, but leaving the amount of “costs as taxed” blank. Held, that the judgment so signed precluded the defendant from afterwards moving in chambers for a stay of execution, pending an application for a new trial, and (*semble*) such a judgment is final : see R. 174 (*post*).

Costs taxed.—See as to taxing costs, RR. 408, *et seq.* (*post*).

134. A plaintiff or defendant having obtained a verdict **C.L.P. Act, S. 134.** may issue execution in the time prescribed, unless the Court or a Judge orders execution to issue at an earlier or later period with or without terms.

Execution after trial.

Execution may issue forthwith on signing final judgment, R. 182; and final judgment may be signed after verdict, as prescribed, RR. 169, 170 (*post*). 17 Vic. No. 21 s. 95.

In reckoning the time within which judgment can be signed after verdict, the days between the Thursday before and the Wednesday after Easter day must be included: *Cox v. Bath* (No. 1), 1893, 9 W.N. 169; but see *Cox v. Bath* (No. 2), 9 W.N. 170, and R. 401 (*post*).

Unless the court or a judge orders execution to issue at an earlier or later period, etc.—As to speedy execution and stay of proceedings, see R. 188 (*post*).

Speedy execution.—When a judge at chambers or the court is asked to grant early execution, it is necessary to show facts justifying such an application. If they appear in evidence upon the trial, and the application is made there and then, no affidavit is necessary; but otherwise, an affidavit is required: *Ruddich v. Simmons*, 1 M. & Rob. 184; *Gervas v. Burchley* (*ibid*) 150, and see R. 188.

Under the same practice in England speedy execution was generally understood to be in four days.

Immediate execution.—Where a certificate, however, is granted for immediate execution, notice of taxation of costs may be given on the day of trial for the following day, and on that day judgment may be signed and execution issued: *Alexander v. Williams*, 4 D. & L. 132.

Stay of execution.—No application to stay execution need be made if a point is reserved for the court or leave is given to move to enter a nonsuit or verdict. The terms (if any) on which execution will be stayed are in the discretion of the judge making the order.

When execution may issue.—Final judgment being signed, the power of the judge is at an end; and execution follows according to the terms of the order, which the judge has no power afterwards to alter: *Lander v. Gordon*, 7 M. & W. 218. Where the judge grants a certificate for speedy execution, the plaintiff should issue one writ of execution for the amount of the verdict and costs: *Smith v. Dickenson*, 5 Q.B. 602.

Final judgment must be signed.—Final judgment must be signed in all cases before execution can be issued: *Colburn v. Hall*, 5 Dowl. 534.

The application for a stay of execution should, as a general rule, be made to the judge who tried the case.

Where the defendant in an action for malicious prosecution, applied for a stay of execution pending a motion for a new trial, but the application was made somewhat late, and not to the judge who tried the case, execution was stayed, but only on the terms that the defendant paid into court, or found security for the amount of the verdict and costs: *Whittaker v. Spies*, (1894) 10 W.N. 121.

After judgment has been signed application for a stay is too late: *Martin v. Fletcher*, 14 W.N. 158.

The court will not as a general rule suspend execution pending an appeal to the Privy Council: *Cameron v. Hay*, (1892) 1 S.C.R. 7; and the fact that the court itself is divided in opinion is not of itself sufficient to take the case out of the general rule, where the appellant has caused delay by not prosecuting an appeal against a prior judgment in the case: *Byrnes v. Williams*, (*ibid.*) p. 9; but see Privy Council, *post*.

Stay of execution having been granted *ex parte* after the trial (and after judgment signed), the order was set aside as made contrary to the Rule (188): *A.J.S. Bank v. Proudfoot*, (1885) 2 W. N. 24; and as to stay after judgment, see *Martin v. Fletcher* (*supra*).

In *Blaxland v. Grattan*, (1886) 3 W.N. 5, it was held that the irregularity of execution having issued in eight days instead of sixteen, was waived as the defendant's attorney had attended at the taxation of costs.

In an action in the Supreme Court to recover £14 14s. 7d., the defendant pleaded, except as to £9 14s. 7d., payment. Plaintiff, thereupon, entered a *nolle prosequi* as to £5, signed judgment for £9 14s. 7d., and obtained a certificate of costs. Immediately upon obtaining the certificate he issued execution. The certificate was subsequently set aside, whereupon the plaintiff issued execution on the original judgment, and on defendants seeking to have this execution set aside, it was held, that the plaintiff was entitled to issue execution immediately for the amount

**C.L.P. Act,
S. 134.**

of the judgment without costs, and as the judge's order, setting aside the certificate, was not made a rule of court, the plaintiff was not bound to deduct the costs awarded to the defendant under that order, from his judgment. Defendant's summons to set aside the execution dismissed with costs: *Ibbotson v. Hudson*, (1888) 4 W.N. 154.

Execution in ejectment is regulated by ss. 228, 229 (*post*).

Expenses of
execution.
17 Vic. No. 21,
s. 96.

135. In every case of execution the party entitled to execution may levy the poundage fees and expenses of the execution over and above the sum recovered.

This section would seem to apply even though under s. 267 (*post*) the party issuing execution is not entitled to costs: *Armitage v. Jessop*, L.R. 2 C.P. 12.

The sheriff's fees are now regulated by the Sheriff Act, 1900 (*post*).

The sheriff is not entitled to poundage where there has been no levy, as when the money is paid: *Graham v. Grill*, 2 M. & S. 296; *Nash v. Dickenson*, L.R. 2 C.P. 252; or tendered: *Colls v. Coatee*, 11 Ad. & E. 826; or where the levy is only colourable: *Brun v. Hutchinson*, 2 D. & L. 43; but see *Bissicks v. Bath Colliery Co.*, 36 L.T.N.S. 800; 46 L.J.Q.B. 611; 2 Ex. D. 459; affirmed on appeal, 38 L.T.N.S. 163, where *Nash v. Dickenson* was not followed. See also *In re Sly*, (1890) 11 N.S.W.R. 39; 6 W.N. 146, where a writ of *fi. fa.* was lodged endorsed to levy on the lands, goods, etc., of L.; the sheriff went into possession and shortly afterwards was instructed to withdraw, no sale having been effected, and there being no compromise. The sheriff claimed poundage fees, but the attorney refused to pay them on the ground that no money was received under the writ. The Court, following *Mortimer v. Cragg*, 3 C.P.D. 216, held that in order to entitle the sheriff to poundage, there must be something more than seizure, and that as in this case the execution creditor had derived no benefit from the seizure, the sheriff was clearly not entitled to poundage. He is entitled to poundage on the whole proceeds of the sale where a portion is paid over to the landlord for rent: *Davies v. Edmonds*, 12 M. & W. 31; 1 D. & L. 395.

The costs of an abortive *fi. fa.* cannot be levied under a subsequent *ca. sa.*: *Salisbury, Marquis of v. Ray*, 8 C.B., N.S. 193; 29 L.J.C.P. 225.

The sheriff may be compelled to return the writ, and after he has returned it, either party may compel the sheriff, by a judge's order, to deliver particulars of the manner in which he has disposed of the proceeds of the execution; see hereon *Levi v. Hale*, 29 L.J.C.P. 127. The sheriff's expenses may be taxed and assessed on a judge's order: see R. 371 (*post*).

The prothonotary has no power to tax the fees charged by the sheriff, where the fees are those which the sheriff is entitled to charge under 50 Vic. No. 31 (now the Sheriff Act, 1900): *Gardiner v. Orr*, (1894) 15 N.S.W.R. 115; 10 W.N. 193; though the prothonotary might tax in respect of expenses other than fees (*ibid*).

The sheriff can by summary application to the Court call on the attorney in the cause to pay the fees and expenses of execution: *In re Mitchell*, (1889) 10 N.S.W.R. 111; 5 W.N. 129; *In re Mimna*, (1896) 13 W.N. 25.

Execution in
actions for
recovery of
specific goods.
Ibid. s. 97.

136. (1) When the action has been brought to recover specific goods, and the plaintiff has claimed a return of such goods or their value and damages for their detention, and has recovered a verdict and judgment in such action, the sheriff may, if so required by the plaintiff, demand and seize the specific goods claimed if they can be found by him, and deliver them to the plaintiff.

(2) If the sheriff does not find and seize the said goods, the Court or a Judge, on the application of the plaintiff, may order the actual return thereof, and enforce such order by process of attachment.

(3) If such application is refused, or if such order is not obeyed, the plaintiff may by leave of a Judge procure a separate writ of *fieri facias* to be issued for the value of the goods, without prejudice to his right to issue execution either before or after or concurrently therewith for his costs of suit and the damages awarded for the detention of the goods.

See s. 70, and Sch. II., Form No. 10, Chitty's Archbold, 710.

137. A writ of execution if unexecuted shall not remain in force for more than one year from the teste of such writ unless renewed in the manner hereinafter provided. **6.L.P. Act, s. 137.**

As to the sheriff's duty on the execution of writs, see RR. 364, *et seq.*, *post*; and *Hunt v. Hooper*, 1 D. & L. 626; where the cases are collected; *White v. Prebble*, 22 L.J.C.P. 115; and *Levi v. Hale*, 29 L.J.C.P. 127; and as to endorsement of address of defendant, *Childers v. Wooler*, 2 E. & E. 287; 29 L.J.Q.B. 129.

Writs of execution to remain in force for one year only unless renewed.

17 Vic. No. 21, s. 98.

Unless renewed.—As to the renewal of writs and the calculation of the time for renewal, see note to s. 12, *ante*.

138. (1) Such writ may at any time before its expiration be renewed by the party issuing it for one year from the date of such renewal, and so on from time to time during the continuance of the renewed writ, either by being marked by the prothonotary with the date of the day, month, and year of such renewal, or by such party giving a written notice of renewal to the sheriff signed by the party or his attorney, and countersigned by the prothonotary.

Renewal.

Ibid.

(2) A writ of execution so renewed shall have effect and be entitled to priority according to the time of the original delivery thereof.

See R. 183 (*post*).

139. The production of a writ of execution purporting to be so marked, or of the notice renewing the same purporting to be so countersigned, showing the same to have been renewed according to this Act, shall be sufficient evidence of its having been so renewed.

Evidence of renewal.

Ibid. s. 99.

Sufficient evidence.—This means *prima facie* evidence: *Barraclough v. Greenhough*, L.R. 2 Q.B. 612; and *Fisher v. Cox*, 16 L.T.N.S. 397.

PART XIV.

INTEREST AND DAMAGES IN THE NATURE OF INTEREST.

140. Upon all debts or sums certain recovered in any action, the jury on the trial of any issue or assessment of any damages may, if they think fit, allow interest to the creditor at a rate not exceeding eight per centum or (in respect of any bill of exchange or promissory note) at a rate not exceeding twelve per centum per annum—

Interest to be allowed on trials in certain cases.

5 Vic. No. 9, s. 23.

- (a) from the time when such debt or sum was payable (if payable by virtue of some written instrument, and at a date or time certain); or
- (b) if payable otherwise, then from the time when demand of payment has been made in writing giving notice to the debtor that interest would be claimed from the date of such demand:

Provided that nothing herein contained shall extend to authorise the computation of interest on any bill of exchange or promissory note at a higher rate than eight per centum per annum where there has been no plea pleaded.

**C.L.P. Act,
S. 140.**

Recovered in any action.—This section applies only to cases where the principal sum is recovered in an action, and the interest is given by the jury as damages see *Mort v. Hughes*, (1864) 3 S.C.R. 17. In that case the plaintiffs overpaid the defendants £560. After several demands, and no compliance or reply, the plaintiffs wrote giving notice that they should insist on interest. The defendants still neglected to repay the amount or to answer the letters; but at last they repaid the principal but not the interest. *Held*, that the plaintiffs were not under the circumstances, entitled to recover the interest, although under this section, the jury, if they thought fit, might have given interest in an action for the principal.

A claim for interest indorsed on the writ is not a good notice that interest will be claimed under this section : *Rhymney R. Co. v. Rhymney Iron Co.*, 25 Q.B.D. 146.

Damages in nature of interest.

5 Vic. No. 9,
s. 24.

141. The jury on any trial or assessment of damages may, if they think fit, give damages in the nature of interest—

- (a) over and above the value of the goods at the time of the conversion in actions of trover or trespass concerning goods; and
- (b) over and above the money recoverable in actions on policies of insurance, made after the twenty-eighth day of September, in the year one thousand eight hundred and forty-one, being the date of the passing of the Act fifth Victoria number nine.

Policies of insurance.—See *Lewington v. Scottish Union Co.*, (1901) 18 W.N. 275.

Verdicts to carry interest:

24 Vic. No. 8,
s. 1.

142. (1) Every plaintiff who obtains judgment upon a verdict shall be entitled to interest at the rate of eight per centum per annum on the amount of such verdict from the time of obtaining such verdict until the time of entering up judgment thereon.

(2) The amount of such interest shall be included in the judgment.

The Interest on Judgments Amendment Act, 1900 No. 5 [assented to 3rd August, 1900] enacts as follows :—

1. From and after the passing of this Act the rate of interest on verdicts and judgments in the Supreme Court shall be four per centum per annum in lieu of the rate fixed by the Act number twenty-one of one thousand eight hundred and ninety-nine.
2. So much of the act number twenty-one of one thousand eight hundred and ninety-nine as is inconsistent with the provisions of this Act is hereby repealed.
3. This Act may be cited as the "Interest on Judgments Amendment Act, 1900."

In 1861, when the Act 24 Vic. No. 8, was passed providing that the rate of interest on verdicts should be 8 per cent., that was the ruling rate of interest in the colony, but circumstances have changed, and for some considerable time the rate has been very much less. The necessity for a change in the law was seen when the decision in the case of *McSharry v. The Railway Commissioners*, (1899) 20 N.S.W.R. 311; 16 W.N. 73, was given. In that case the plaintiff in an action which had been referred to arbitration, and in which he had been awarded £13,408, refused to accept that sum, the costs not having been taxed in the matter. It was *held*, that the Court could not compel him to take that sum, and would not allow the defendants to pay the amount into Court in order to relieve themselves of their liability to pay 8 per cent. interest on the amount.

In *Sinclair v. Great Eastern Railway Co.*, (1870) L.R. 5 C.P. 391, an award had been made, and judgment had been signed for £28,850. The defendants, being dissatisfied with the award, wanted to move to set it aside, and applied for a stay of proceedings in the meantime, which was granted on the payment of the £28,850 into Court. Afterwards the motion to set aside the award came on to be heard and was discharged. Immediately after this the defendants intimated to the plaintiff that the money was in Court at the plaintiff's risk, and that they would refuse to pay

interest on it after the date when the application to set aside the award was refused, and that they were willing to do anything to enable the plaintiff to take it out of Court. The Court held that the defendants were not bound to pay interest after that date. The distinction between that case and the *McSharry* case is that in the former case there was a plain understanding between the parties that the amount in Court should be paid out to the plaintiff in the event of the motion being refused, whereas in the *McSharry* case there was nothing of that kind at all. And in the absence of such an understanding defendant is liable to pay interest even though the amount of the verdict is paid into Court: *Howell v. Neeld*, (1901) 18 W.N. 235. **C.L.P. Act, S. 142.**

The amount of such interest shall be included in the judgment.—The interest is payable upon the amount of the verdict from the time of obtaining it until the time of entering up the judgment, and is to be included in the judgment and forms part of it: *Owston v. The Bank of New South Wales*, (1877) Knox 90; (1879) L.R. 4 App. Cases 270.

So in *Graham v. Proudfoot*, (1894) 15 N.S.W.R. 452; 11 W.N. 91, the plaintiff obtained a verdict for £494 on the 19th September. On the 5th of November, the Court refused a rule nisi for a new trial. On that day the verdict with the interest allowed by s. 1 of 24 Vic. No. 8 did not amount to £500. On the 19th November, the defendant filed a petition for leave to appeal to the Privy Council. On that day the verdict with the interest added exceeded £500. On November 23rd plaintiff signed judgment for £494 only. It was held that defendant was entitled to leave to appeal to the Privy Council as the amount involved was the amount of the verdict together with the interest to which the plaintiff was entitled at the time of signing judgment; and this although after petition the plaintiff had signed judgment for £494 only.

143. (1) Every judgment debt recovered in the Court shall carry interest at the rate of eight per centum per annum from the time of entering up the judgment until the same is satisfied. Judgment debts to carry interest. 24 Vic. No. 8, s. 2.

(2) Such interest may be levied under a writ of execution on such judgment.

See the Interest on Judgments Amendment Act, No. 5, 1900 (*supra*).

PART XV.

REVIVOR, SCIRE FACIAS, &C.

144. During the lives of the parties to a judgment, or those of them during whose lives execution might, before the commencement of the Common Law Procedure Act of 1853, have issued within a year and a day without a *scire facias*, and within six years from the recovery of the judgment, execution may issue without a revival of the judgment. Execution in six years without revival. 17 Vic. No. 21, s. 101.

Formerly when a year and a day had elapsed without execution being issued on a judgment, the law presumed it to be satisfied; and at common law the only remedy (in personal actions) was by an action of debt on the judgment.

Execution may now be issued within six years from the recovery of the judgment, during the lives of the parties to the judgment, without revival. In case of the death of any of the parties, a suggestion on the record, or a writ of revivor, is necessary.

Execution issued after the six years is voidable: *Goodtitle v. Badtitle*, 9 Dowl. 1009; and not void: *Blanchenay v. Burt*, 4 Q.B. 707.

145. (1) Where it becomes necessary to revive a judgment by reason either of lapse of time or of a change by death or otherwise of the parties entitled or liable to execution, the party alleging himself to be entitled to execution may either Revival of judgment. Ibid. s. 102.

**C.L.P. Act,
S. 146.**

- (a) sue out a writ of revivor in the form hereinafter mentioned; or
- (b) apply to the Court or a Judge for leave to enter a suggestion upon the roll to the effect that it manifestly appears to the Court that such party is entitled to have execution of the judgment and to issue execution thereupon.

(2) The application for such leave shall be made upon a rule to show cause or a summons in the Form No. 18 contained in the Second Schedule hereto, or to the like effect, to be served according to the present practice or in such other manner as the Court or Judge directs.

Writ of revivor.—Sect. 147 (*post*).

Suggestion.—The facts upon which the application is made, for instance, that judgment was signed more than six years before the date of the application, and is still unsatisfied, must be shown to the court by affidavits: see s. 150 (*post*). If the application is made by executors, the affidavits must further show that probate of the will has been granted to them: *Vogel v. Thompson*, 1 Exch. 60.

In *Allt v. Murray*, (1895) 12 W.N. 36, an application to revive a judgment obtained more than twenty years before, was granted without prejudice to defendant's right, if execution should be issued, to take objection that the judgment was more than twenty years old. In this case the application was granted with costs, which were assessed at £4 4s.

See also *In re Cook*, (1896) 17 N.S.W.R., B. & P. 44; 12 W.N. 107; 6 B.C. 82; and *Hoskins v. Thompson*, (1894) 10 W.N. 121.

Where a company has recovered judgment in an action, and its property has afterwards been vested in a new company, under the Reconstructed Companies Act, 1894, a suggestion to revive the judgment cannot be entered in the name of the old company: *E.S. & A.C. Bank v. Brown*, (1897) 13 W.N. 80.

The rule to show cause may be served abroad: *Stockport v. Hawkins*, 1 D. & L. 204. Personal service is not necessary, if the defendant can be shown to be avoiding the service of the rule: *Dixon v. Thorold*, 9 Dowl. 827.

Proceedings upon application for suggestion to revive judgment.
17 Vic. No. 21, s. 103.

146. (1) Upon such application if it manifestly appears that the party making the same is entitled to execution, the Court or Judge shall allow such suggestion as aforesaid to be entered in the Form No. 19 contained in the Second Schedule hereto, or to the like effect, and execution to issue thereupon, and shall order whether or not the costs of such application shall be paid to the party making the same.

(2) If it does not manifestly so appear, the Court or Judge shall discharge the rule or dismiss the summons with or without costs: Provided that in such last-mentioned case the party making such application may proceed by writ of revivor or action upon the judgment.

See as to what should appear upon the affidavits, in the case of a judgment more than twenty years old (*per Wightman, J.*): *Loveless v. Richardson*, 2 Jur., N.S. 716.

In *Allt v. Murray*, (1895) 12 W.N. 36, costs of the application were allowed and assessed, see note to preceding section. See *E.S. & A.C. Bank v. Brown*, (1897) 13 W.N. 80, cited in note to preceding section.

Writ of revivor and proceedings thereon.
Ibid. s. 104.

147. (1) The writ of revivor shall be directed to the party called upon to show cause why execution should not be awarded, and shall bear teste on the day of its issuing, and after reciting the reason why such writ has become necessary it shall call upon the party to whom it is directed to appear within eight days after service thereof to show cause why the party at whose instance

such writ has been issued should not have execution against the party to whom such writ is directed, and it shall give notice that in default of appearance the party issuing such writ may proceed to execution. **C.L.P. Act, s. 147.**

(2) Such writ may be in the Form No. 20 contained in the Second Schedule hereto, or to the like effect, and may be served and otherwise proceeded upon whether in term or vacation in the same manner as a writ of summons.

(3) The venue in a declaration upon such writ may be laid in any district, and the pleadings and proceedings thereupon, and the rights of the parties respectively to costs, shall be the same as in an ordinary action.

The writ of revivor.—The writ of revivor lies on a judgment in ejectment : *Doe v. Roe*, 2 Dowl. N.S. 690. If the judgment is under ten years old it may be sued out as a matter of course : s. 150 (*post*).

It must be sued out of the court in which the judgment was given (Com. Dig. Pl. 3, L. 3) ; and as it is a judicial writ it must follow the judgment : *Panton v. Hale*, 2 Salk. 598. A writ of revivor of a judgment of assets, *quando acciderint*, would be bad, if it prayed execution of assets generally : *Mara v. Quin*, 6 T.R. 1 ; and see *Smith v. Tateham*, 2 Exch. 205.

Shall bear teste.—The writ is sued out on a *præcipe*, as in the case of a writ of summons. It bears *teste* on the day of its issuing. The form of writ given in the Schedule is to be followed ; and it is to be served, and otherwise proceeded upon, as a writ of summons.

In default of appearance.—As to appearance to the writ, see s. 149 (*post*).

By analogy to the practice on proceedings by *scire facias*, the writ of revivor, if irregular, may be quashed at the costs of the plaintiff, if the defendant has appeared : *Oliverson v. Latour*, 7 Dowl. 605. It may be amended, also, to make it correspond with the record : *Braswell v. Jeco*, 9 East, 316, and this after a plea of *nul tiel record* : *Parkins v. Petit*, 1 B. & P. 275 ; and see *Holland v. Phillips*, 10 Ad. & E. 149, and the cases there referred to.

A plaintiff may not quash his own writ of *scire facias*, or revivor, after a defendant has appeared, except on payment of costs : R. 208 (*post*).

The venue . . . and the pleadings.—This is the same practice as in England where the venue in the declaration of a writ of revivor may be laid in any county, and the pleadings and other proceedings are to be the same as in ordinary actions. The defendant will not be at liberty to plead to the declaration any matter which might have been pleaded or set up as a defence to the original action : *Bradley v. Eyre*, 11 M. & W. 432. The judgment itself cannot be impeached on showing cause against the rule, but a cross-motion to set it aside should be made for that purpose : *Thomas v. Williams*, 3 Dowl. 655 ; *Dodgson v. Scott*, 2 Exch. 457 ; or the objection may be taken by a plea to the *sci. fa.* : *Dodgson v. Scott* (*supra*).

148. All writs of scire facias issued—

- (a) against bail on a recognizance ; or
- (b) against members of a joint stock company or other body upon a judgment recorded against a public officer or other person sued as representing such company or body, or against such company or body itself ; or
- (c) by or against a husband to have execution of a judgment for or against a wife ; or
- (d) upon a suggestion of further breaches after judgment for any penal sum pursuant to the Imperial Act eighth and ninth William the Third, chapter eleven, intituled "*An Act for the better preventing frivolous and vexatious suits*,"

shall be tested, directed, and proceeded upon in like manner as writs of revivor.

Writs of scire facias.
17 Vic. No. 21,
s. 105.

**C.L.P. Act,
S. 148.**

Writs of scire facias.—A *scire facias* is a writ, founded on some matter of record, as judgments for debt or damages, recognizances, letters patent or charters, either to enforce them, or, as in the case of letters patent, or charters, to set them aside. It derives its name from the operative words of the writ, and is a warning to the defendant to appear and plead in bar of execution, or show any cause if he can, why execution should not issue against him on the judgment on record, or why the record should not be annulled and vacated.

It is, in some cases, a judicial writ, as when required against some person not a party to the judgment, or upon a suggestion of further breaches after judgment in an action upon a bond; for it is then only a *quasi* continuation of a former suit, and in such cases is properly called a writ of execution. In other cases, such as to repeal letters patent or to enforce recognizances, it is considered an original writ. In all cases it is in law considered an action, because it may be pleaded to, and it is held that a release of all actions, or a release of all executions is a good bar to a *scire facias*: *Renton's Encyclopædia of the laws of England*.

It may be observed that the writ of *scire facias* is, to some extent, superseded by the writ of revivor; but it is not abolished.

Against members of a joint stock company, etc.—As to *scire facias* against members of a public company, see *Clowes v. Brettell*, 11 M. & W. 461; *Scott v. Uxbridge, &c., Ry. Co.*, L.R. 1 C.P. 596; *Ilfracombe Ry. Co., v. Devon & Somerset Ry. Co.*, L.R. 2 C.P. 15; *Williams v. Sidmouth Ry. Co.*, L.R. 2 Ex. 284; *Shrimpton v. Id.*, L.R. 3 C.P. 80; *Rigby v. Dublin, &c., Ry. Co.*, L.R. 2 C.P. 586; *Burke v. Id.*, L.R. 3 Q.B. 47; *Ilfracombe Ry. Co. v. Lord Poltimore*, L.R. 3 C.P. 283.

By or against a husband.—See s. 159 (*post*).

Proceedings against executors upon a judgment of assets *in futuro* may be had in like manner as writs of revivor: s. 151 (*post*).

Act 8 & 9 Wm. III, c. 11.—For provisions of Act see Bullen & Leake, 3rd ed. p. 115.

As to service of *sci. fa.*, see R. 207 (*post*).

Appearance to writ of revivor.
17 Vic. No. 21, s. 106.

149. Notice in writing to the plaintiff, his attorney or agent, shall be sufficient appearance to a writ of revivor.

Rule or order for writ of revivor upon a judgment.
Ibid. s. 107.

150. A writ of revivor to revive a judgment less than ten years old shall be allowed without any rule or order, if more than ten years old not without a rule of Court or a Judge's order, nor if more than fifteen without a rule to show cause.

Under the old practice, orders for a *sci. fa.* were granted without a summons where the judgment was less than fifteen years old, on an affidavit setting forth the judgment, and stating it to be still unsatisfied (*Tidd's Forms*, 477). This affidavit ought to be made by the party; or if by the attorney, it should be by the attorney in the cause when judgment was obtained, otherwise an affidavit from such attorney should, if possible, be obtained: *Norfolk v. Spencer*, 4 Dowl. 746. But an affidavit by the attorney suing out the writ will be sufficient in some cases, as where plaintiffs in revivor, as executors, were infants and abroad at the time of the judgment, and the rule was *nisi* only in the first instance: *Smith v. Mee*, 1 D. & L. 907. The application for leave to sue out this writ will not, it would appear, be within the general rule of all the courts, that a matter cannot be agitated *twice*; so that a fresh application, if the first is refused or a judge's order thereon abandoned, may be made on fresh materials: *Dodgson v. Scott*, 2 Exch. 457.

The rule to revive after fifteen years is *nisi*. Where the defendant was in America, but was the owner of houses in England, service of the rule was ordered to be, by sticking it up in the office, and serving copies on the tenants in possession: *Macdonald v. Maclaren*, 11 M. & W. 465.

Scire facias on judgment of assets *in futuro*.
20 Vic. No. 31, s. 55:

151. Proceedings against executors upon a judgment of assets *in futuro* may be had and taken in the manner hereinbefore provided as to writs of revivor.

If, on a plea of *plene administravit*, the plaintiff took judgment of assets *quando acciderint*, the assets afterwards came into the hands of the executor, the plaintiff must at common law have sued out a *scire facias* against the executor, before he could have had execution: 2 Wms. Saund. 219, (2); *Smith v. Tateham*, 2 Exch. 203.

If upon this writ of *sci. fa.* assets are found for part, the plaintiff may have judgment to recover so much immediately, and the residue of the assets *in futuro*: 1 Wms. Saund. 336, 10. As to what must be stated in the writ of *sci. fa.* on a judgment of assets *in futuro*, see 2 Wms. Saund. 218.

**C.L.P. Act,
S. 151.**

PART XVI.

DEATH OR MARRIAGE OF PARTIES.

152. The death of a plaintiff or defendant shall not cause the action to abate, but it may be continued as hereinafter mentioned.

Action not to abate by death.
17 Vic. No. 21,
s. 108.

This and the following sections give a right to the personal representative of a deceased sole plaintiff, to enter a suggestion of the death of the plaintiff, and to continue the action only in those cases where the cause of action would before that act have survived to the representative, and he could have commenced an action in his representative character: *Flinn v. Perkins*, 32 L.J., Q.B. 10, B.C., (*Crompton*, J.)

As judicial proceedings are to be considered as taking place at the earliest period of the day on which they are done, it was held, in a case where judgment was signed and execution issued on the day on which the defendant died, that the judgment and execution were regular: *Wright v. Mills*, 4 H. & N. 488; 28 L.J. Ex. 223.

See as to proceedings by a defendant or his representative, when default is made in prosecuting the action after abatement by reason of death, s. 158 (*post*).

153. If there be two or more plaintiffs or defendants, and one or more of them shall die, and the cause of such action survives to the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants, the action shall not be thereby abated, but such death being suggested upon the record the action shall proceed at the suit of the surviving plaintiff or plaintiffs against the surviving defendant or defendants.

Death of one or more of several plaintiffs or defendants.
Ibid. s. 109.

This section is in the words of 8 & 9 Will. 3, c. 11, s. 7. If the death happens before issue joined, it should be suggested in making up the issue: *Far v. Denn*, 1 Burr. 362. If it happens after issue joined, it should be suggested in the *Nisi Prius* record: *R. v. Cohen*, 1 Stark. 511; and the suggestion must be entered, and the facts thus brought to the knowledge of the court before any further proceedings can be taken: *Pinkus v. Sturch*, 5 C.B. 474; *Larchin v. Buckle*, 1 L.M. & P. 740. If the suggestion be not made before the trial, the trial is a nullity; *R. v. Cohen (supra)*. It would seem that the suggestion may be made by either party: *Pell v. Linnell*, L.R. 3 C.P. 441.

An action by husband and wife, in right of the wife, survived to her upon her husband's death: *Sherrington v. Yates*, 12 M. & W. 855, Ex. Ch.

Affidavits to be used in the cause after the death of any of the parties should be entitled in the names of the survivors only: *Larchin v. Buckle (supra)*.

Where there are two or more plaintiffs or defendants, and one or more of them die after judgment, execution by *fi. fa.* or *ca. sa.* may be had within six years for or against the survivors, without revivor. The execution should follow the judgment, and be sued out in the joint names of all the parties; but a joint execution may be levied upon one only, by directing the sheriff to levy accordingly: 2 Wms. Saund. 721 (4).

Two defendants, sued jointly on promissory notes, severed in their defences, but filed similar pleas, to which the plaintiffs demurred. Briefs were delivered, and the demurrers set down for hearing in the second term, but were not reached until the third term, when judgment was given for the defendants. Between the second and third terms, one of the defendants died. *Held*, that his executors were entitled to have judgment entered *nunc pro tunc* as the second term, so that they might get the costs incurred before his death: *Hoskins v. Thompson*, (1894) 10 W.N. 121.

In *Macanish v. Bouman*, (1871) 10 S.C.R. 370, which was an action of trespass, one of the defendants died after the conclusion of the evidence on both sides, but before verdict, and no suggestion of the death was entered on the record. *Held*,

**C.L.P. Act,
s. 153.**

that the action was not thereby abated or suspended so as to render the verdict of no effect, and leave given to the defendants or (on their default) to the plaintiff to enter the suggestion as of the true date of the death *nunc pro tunc*. The entry of such a suggestion need only be made when a new step in the cause is taken. The whole trial, once commenced, however protracted, is one and the same proceeding, and in legal contemplation is but as one day. This and the preceding section apply to those cases only, in which, but for the enactment, the action would abate—the cause of action surviving. The statute has not abated or suspended any actions other than such as were abated by the death of parties before the passing of the Common Law Procedure Acts; consequently an omission to enter at the proper time a suggestion of the death would be a mere irregularity, with which the court can deal as it shall think fit (*ibid.*).

The respondent in an appeal to the Privy Council died intestate before the hearing of the appeal, and, in ignorance of such death, the Privy Council gave judgment, and ordered the appellant to pay the costs of the appeal. Afterwards a suggestion of the death was entered in this Court. *Held*, that the appellants were liable, in an action on the bond, for the costs of the appeal, and that whilst the judgment of the Privy Council stood, this court could not treat it as a nullity: *Flood v. Egan*, (1899) 20 N.S.W.R. 333; 16 W.N. 64.

Death of sole plaintiff or sole surviving plaintiff.

17 Vic. No. 21, s. 110.

154. (1) In case of the death of a sole plaintiff or sole surviving plaintiff, the legal representative of such plaintiff may by leave of the Court or a Judge enter a suggestion of the death and that he is such legal representative, and the action shall thereupon proceed.

(2) If such suggestion is made before the trial, the truth of the suggestion shall be tried thereat together with the title of the deceased plaintiff.

(3) The same judgment shall follow upon the verdict in favour of or against the person making such suggestion as if such person were originally the plaintiff.

The words "where the action survives," which are in the following section, are not used here, but this section must be construed as if those words were inserted: *Flinn v. Perkins*, 32 L. J. Q.B. 10, cited in note to s. 152 (*ante*).

Enter a suggestion of the death, etc.—The entry of this suggestion must be made before any further proceeding in the action: s. 153, n. (*ante*). It can be made only by leave of the court or a judge. The suggestion, it would appear, is traversable; *Watson v. Quilter*, 1 D. & L. 244, and the truth of it, if made before trial, may be tried thereat.

In *Barnwell v. Sutherland*, 1 L.M. & P. 159, the action had proceeded to trial, in the name of a public officer, substituted immediately before the trial, in the place of one who had died, and whose death was suggested on the record; and the verdict was set aside, as the suggestion had been entered without the authority of the court, and without an opportunity being given to the defendant to traverse the fact suggested. In this case are collected all the cases relating to the entry of suggestions.

See as to proceedings by a defendant upon abatement by death, s. 158 (*post*).

Death of sole defendant or sole surviving defendant.

Ibid., s. 111.

155. (1) In case of the death of the sole defendant or sole surviving defendant where the action survives, the plaintiff—

(a) may make a suggestion, either in any of the pleadings if the pleadings have not arrived at issue, or in a copy of the issue if they have so arrived, of the death, and that a person named therein is the executor or administrator of the deceased; and

(b) may thereupon serve such executor or administrator with a copy of the writ and suggestion, and with a notice signed by the plaintiff or his attorney requiring such executor or administrator to appear within eight days after service of the notice inclusive of the day of such

service, and that in default of his so doing the plaintiff **C.L.P. Act,** may sign judgment against him as such executor or **S. 155.** administrator.

(2) The same proceedings may be had and taken in case of non-appearance after such notice as upon a writ against such executor or administrator in respect of the cause for which the action was brought.

(3) If no pleadings have taken place before the death, the suggestion shall form part of the declaration, and the declaration and suggestion may be served together, and the new defendant shall plead thereto at the same time.

(4) If the plaintiff has declared but the defendant has not pleaded before the death, the new defendant shall plead at the same time to the declaration and suggestion.

(5) If the defendant has pleaded before the death, the new defendant may plead to the suggestion only by way of denial, or such plea as may be appropriate to and rendered necessary by his character of executor or administrator, unless by leave of the Court or a Judge he is permitted to plead fresh matter in answer to the declaration.

(6) If the defendant has pleaded before the death, but the pleadings have not arrived at issue, the new defendant besides pleading to the suggestion shall continue the pleadings to issue in the same manner as the deceased might have done.

(7) The pleadings upon the declaration and the pleadings upon the suggestion shall be tried together.

(8) If the plaintiff recovers he shall be entitled to the like judgment in respect of the debt or sum sought to be recovered and in respect of the costs prior to the suggestion, and in respect of the costs of the suggestion and subsequent thereto he shall be entitled to the like judgment as in an action originally commenced against the executor or administrator.

Where a plaintiff discontinued, after appearance by an administratrix, she was held to be entitled to the whole of defendant's costs of suit : *Benge v. Swaine, Administratrix, &c.*, 15 C.B. 784 ; 23 L.J. C.P. 182.

155. The death of either party between the verdict and the judgment shall not prejudice the judgment, so as such judgment be entered within two terms after such verdict.

Death between verdict and judgment.

17 Vic. No. 21, s. 112.

Judgment nunc pro tunc.—If either party dies after a special verdict, or special case, or during the argument of a motion in arrest of judgment, or for a new trial, judgment may be entered, at common law, after the death, as of the term in which judgment should have been given, *nunc pro tunc* : *Carlisle v. Garland*, 9 Bing. 85. So in the case of a verdict subject to an award, when the award is made in the lifetime of both parties, but the successful party dies pending a rule to set it aside, judgment may be entered *nunc pro tunc* : *Bridges v. Smith*, 8 Bing. 29 ; see also *Heathcote v. Wing*, 11 Exch. 355 ; 25 L.J. Ex. 23. So where leave is given to the defendant to enter a verdict, and he dies after the trial and before the next term, the motion to enter the verdict may be made without putting the executors on the record, and the verdict entered accordingly : *Freeman v. Rosher*, 13 Q.B. 780. So, where a cause is referred to a barrister to state a special case, it may be stated after the death of one of the parties, and judgment entered accordingly : *James v. Crane*, 15 M. & W. 379. The delay being the act of the court, and not of the party, judgment is entered *nunc pro tunc*, that the parties may not be prejudiced : 2 Wms. Saund. 72 o, p. ; and see *Miles v. Williams*, 9 Q.B. 47 ; *Freeman v. Tranah*, 12 C.B. 406 ; 21 L.J. C.P. C.L.P.A. 7

C.L.P. Act, 214; *Heathcote v. Wing* (*supra*); and *Moore v. Roberts*, 3 C.B., N.S. 844, where, in the absence of a legal representative of the deceased plaintiff, his former attorney in the cause showed cause against a rule obtained by the defendant to enter judgment of nonsuit *nunc pro tunc*.

S. 156.

This section is in the words of 17 Car. 2. c. 8, s. 1. Under the similar provisions of that statute, it was held that the death of either party *before* the assizes was not remedied (this case is provided for by other sections of this statute); but if the party died after the assizes began, though the trial were after the death, it is within the remedy of the statute, the assizes being but one day in law: see *Macanish v. Bowman*, note to s. 153 (*ante*); so if the party died before trial, and after the first day of the sittings, or at the adjourned sittings: *Chcetham v. Sturtevant*, 1 D. & L. 631, the judgment is entered by or against the party as if he were living, and must be signed within two terms after the verdict; for signing it is an entering within this section: 2 Wms. Saund. 72 n; and see *Freuen v. Lethbridge*, 7 W.R. 442.

This enactment is not confined to actions which would have survived; therefore, an executor may enter up judgment on a verdict obtained by the testator in an action for libel: *Palmer v. Cohen*, 2 B. & Ad. 966; *Kramer v. Waymark*, L.R. 1, Ex. 241.

Death after interlocutory and before final judgment.

17 Vic. No. 21, s. 113.

157. (1) If the plaintiff in any action dies after an interlocutory judgment and before a final judgment obtained therein the action shall not abate by reason thereof if such action might be originally prosecuted or maintained by the executor or administrator of such plaintiff.

(2) If the defendant dies after such interlocutory judgment and before final judgment therein obtained, the action shall not abate if such action might be originally prosecuted or maintained against the executor or administrator of such defendant.

(3) The plaintiff, or if he be dead after such interlocutory judgment his executors or administrators, may sue out a writ of revivor in the Form No. 20 contained in the Second Schedule hereto, or to the like effect, against the defendant if living after such interlocutory judgment, or if he be dead then against his executors or administrators, to show cause why damages in such action should not be assessed and recovered by him or them.

(4) If such defendant, his executors or administrators, appear at the return of such writ, and do not show or allege any matter sufficient to arrest the final judgment, or make default, a writ of inquiry of damages shall thereupon be awarded, or the amount for which final judgment is to be signed shall be referred to the prothonotary as hereinbefore provided.

(5) Upon the return of the writ or delivery of the order with the amount indorsed thereon to the plaintiff, his executors or administrators, final judgment shall be given for the said plaintiff, his executors or administrators prosecuting such writ of revivor against such defendant, his executors or administrators respectively.

If the plaintiff in any action dies after, etc.—On the death of the plaintiff, the action does not abate, if it is such as might have originally been maintained by the executor or administrator. An action for libel, not being such an action, does, therefore, abate by the death of the plaintiff, after interlocutory judgment, and after the execution of the writ of inquiry, if the death takes place before final judgment: *Ireland v. Champneys*, 4 Taunt. 884; see *Kramer v. Waymark*, L.R. 1, Ex. 241; and *Palmer v. Cohen*, 2 B. & Ad. 966.

If the defendant dies, etc.—Neither on the death of a defendant does the action abate, if it is one which might have been maintained against the executors or administrators. Where, however, two defendants are jointly sued, and one dies after

interlocutory and before final judgment, the plaintiff cannot proceed against the executors of the deceased, for the action, being joint, survives against the other defendant: *Fort v. Oliver*, 1 M. & S. 242. **C.L.P. Act, S. 157.**

Writ of inquiry.—In the case of the death of a defendant, when the action was one which might have been maintained against the executors or administrators, it has been decided that, when the writ of inquiry had not been executed, the writ of *sci. fa.* ought to be for the executors or administrators to show cause why the damages should not be assessed and recovered against them: *Tidd's Pract. Forms*, 494; *Smith v. Harmon*, 1 Salk. 315. The writ of revivor given by this section is to the same effect; and if the executors do not appear, or, appearing, do not show matter sufficient to arrest the judgment, a writ of inquiry, or a reference to the prothonotary, s. 129 (*ante*) may be necessary.

Death of defendant after interlocutory and before final judgment.—In the case of the death of a defendant after interlocutory judgment, and after the execution of a writ of inquiry, but before final judgment, the writ of revivor given by this section is not, it would appear, applicable. The *sci. fa.*, in such cases, called on the executors or administrators to show cause why the damages should not be *adjudged* to the plaintiff, or, in case of his death, to his executors or administrators: 2 Wms. Saund. 72 *q*, 4. Nor is there any provision to avoid the necessity of two writs of *sci. fa.* (or revivor); one, to make the executors or administrators parties to the record; the other, to give them an opportunity of pleading want of assets, or other matter that an executor may plead to a *sci. fa.* on final judgment against the testator: see 2 Wms. Saund. 72 *r*, 4.

158. (1) After the death of either party to an action, where the action may be continued under this Act, the defendant or person against whom the action may be so continued may apply by summons to compel the plaintiff, or person entitled to proceed with the action in the room of the plaintiff, to proceed according to the provisions of this Act within such time as the Judge shall order.

To compel continuance or abandonment of action in case of death.
20 Vic. No. 31.
s. 56.

(2) In default of such proceeding, the defendant or other person against whom the action may be so continued as aforesaid may enter a suggestion of such default, and of the representative character of the person by or against whom the action may be proceeded with as the case may be, and have judgment for the costs of the action and suggestion against the plaintiff or against the person entitled to proceed in his room as the case may be, and in the latter case to be levied of the goods of the testator or intestate.

This section enables *defendants*, in all cases of a change of parties by death or otherwise, to bring the proceedings to a close, by compelling the persons entitled to go on with the action to proceed therewith, or have a judgment of *non pros.* signed against him.

The proceedings under this section are to be by summons at chambers.

It may be that a defendant may adopt this course in the case of the death of the husband, in an action brought by a man and his wife, for an injury done to the wife, where the husband has added claims arising to him in his own right, under s. 50 (*ante*). The surviving wife, in respect of claims which survive to her; the legal representative of the husband in respect of his rights of action; are the parties to be called upon to proceed with the action.

In case of the death of one or more of several plaintiffs, or of one or more of several defendants, the surviving plaintiffs, if the cause of action survives to them, are the parties to be called upon to enter a suggestion of the death (*ante*) s. 153; and this, if the death happens *before* issue joined, should be made in the issue: *Farr v. Denn*, 1 Burr. 362; if *after* issue joined, on the *nisi prius* record: *R. v. Cohen*, 1 Stark. 511. The suggestion must be entered before any further proceedings can be taken: *Pinkus v. Sturch*, 5 C.B. 474; and affidavits to be used in the cause after the death of any of the parties should be entitled in the names of the survivors only: *Larchin v. Buckle*, 1 L.M. & P. 740.

If one of several plaintiffs or defendants dies *after judgment*, execution may be had by, or against, the survivors: 2 Wms. Saund. 72, *l*, 4.

**C.L.P. Act,
S. 158.**

In case of the death of a sole, or sole surviving plaintiff, the legal representative is the person to be called upon to enter a suggestion of the death, s. 154 (*ante*), and proceed with the action.

In the case of the death of a sole, or sole surviving defendant, the legal representative may now call upon the plaintiff to proceed, s. 155 (*ante*), and in default, enter a suggestion, and sign judgment under this section.

As to ejectment, see ss. 233—242 (*post*).

The death of either party, between verdict and judgment, does not prejudice the judgment, if judgment be entered up within two terms after verdict, s. 156 (*ante*) and the proceedings in actions which survive may, in the case of the death of either plaintiff or defendant, between interlocutory and final judgment, be continued by or against the legal representative, s. 157 (*supra*).

Marriage does not now cause the action to abate : s. 159 (*infra*).

Marriage not to
abate action.
17 Vic. No. 21,
s. 114.

159. (1) The marriage of a woman plaintiff or defendant shall not cause the action to abate, but the action may, notwithstanding, be proceeded with to judgment.

(2) Such judgment may be executed against the wife alone, or by suggestion or writ of revivor pursuant to this Act judgment may be obtained against the husband and wife and execution issue thereon.

(3) In case of a judgment for the wife, execution may be issued thereupon without any writ of revivor or suggestion.

(4) If in any such action the wife sues or defends by attorney appointed by her when sole, such attorney shall have authority to continue the action or defence as if she had remained sole.

(5) Nothing in this section shall affect the provisions of the Married Women's Property Act or the Married Women's Property Act, 1893, and this section shall be read subject to the said Acts.

The Married Women's Property Acts are now repealed, and re-enacted as the Married Women's Property Act, 1901.

This section does not apply in the case of the marriage of a female defendant after judgment : *Morris v. Coates*, 25 L.T. 176.

Formerly if an action was brought by or against a married woman as a *feme sole*, the defendant in the first case, the wife in the second, could have pleaded in abatement ; but see now the Married Women's Property Act, 1901, as to the right of a married woman to sue and to be sued, and as to the husband's liability in an action against the wife, ss. 38 & 40 (*ante*). This section provides for the event of marriage after action brought.

If a woman married after action brought, and before trial, the coverture was also pleadable in abatement, either directly by such a plea, or by a plea *puis darrein continuance* : *Walker v. Golling*, 11 M. & W. 78. The section prevents coverture being thus pleaded.

Formerly, again, if a *feme sole* obtained judgment, or a judgment was recovered against her, and she married before execution, a *sci. fa.* must have been brought by or against the husband to obtain execution : 2 Wms. Saund. 72, l. 4. In the case of judgment against the wife, the party who has recovered such judgment may either sue out execution against her alone, by her maiden name : *Thorpe v. Argles*, 1 D. & L. 831 ; or proceed by revivor or suggestion under s. 145 (*ante*).

PART XVII.

C.L.P. Act,
S. 160.NEW TRIAL, ARREST OF JUDGMENT, AND JUDGMENT NON
OBSTANTE VEREDICTO.

160. In any action in which a new trial is granted the Court may—

- (a) impose such conditions on and direct such admissions to be made by either party for the purpose of such new trial as the Court thinks fit; and
- (b) grant such new trial either generally or on some particular point or points only as the Court thinks fit; and
- (c) order that the testimony of any witness examined at the former trial may be read from the Judge's notes instead of such witness being again examined in open Court; and
- (d) for several purposes aforesaid make all such orders, from time to time, as may be necessary.

See also the Supreme Court Procedure Act, 1900, (post).

And RR. 150, *et seq.*, post.

Grounds for a new trial.—The principles which guide the court in granting or refusing applications for new trials are the same here as in England. For the English decisions on this subject see Chitty's Archbold, 1518, *et seq.* Some of the grounds on which new trials are granted are here mentioned, illustrated by decisions of our own court.

Verdict against evidence.—The principle which guides the court in granting a new trial on this ground is stated in *Cross v. Goode*, (1887) 8 N.S.W.R. at p. 263. "Now, although the opinion of a judge who tries a case is by no means conclusive, yet in determining whether a verdict is against evidence, his opinion must be taken into serious consideration, and his opinion should form one of the elements upon which the court is to base its determination. It is not sufficient for us to say that on the evidence appearing on the judge's notes we should have come to a different conclusion; nor is it sufficient that we may think the verdict eminently unsatisfactory. We must, in order to set aside a verdict as being against evidence, come to the conclusion that the verdict is not only unsatisfactory, but unreasonable and unjust, and such as reasonable men ought not have found. If the verdict be one such as reasonable men might find, it cannot be disturbed: and for this position the cases of *Solomon v. Bitton*, 8 Q.B.D. 176; *Webster v. Friedeberg*, 17 Q.B.D. 736; and *Metropolitan Railway Co. v. Wright*, 11 A.C. 152, are authorities, if indeed it be necessary to cite authorities for a position now well established." For the older practice, see *Fisher v. Kemp*, (1853) Stephen Sup. Ct. Practice, p. 150. See also *Cooper v. Rutherford*, (1887) 8 N.S.W.R. 195; 3 W.N. 142; *O'Keefe v. Gogerty*, (1871) 10 S.C.R. 15; *Rutter v. Eather*, (1874) 13 S.C.R. 147; *Goldsbrough v. McMahon* (1887) 8 N.S.W.R. 265; *Lloyd v. Osborne*, (1899) 20 N.S.W.R. 127; 15 W.N. 309; *A. J. S. Bank v. Croudace*, (1899) 20 N.S.W.R. 361; 16 W.N. 125; *Gardiner v. City Mutual Life Society*, (1900) 21 N.S.W.R. 251; 17 W.N. 49.

The fact that the jury had a view of the *locus* is important on this ground, but not conclusive in favor of the verdict: *Von Meyer v. Borough of East St. Leonards*, (1886) 3 W.N. 13.

The fact that there have been two trials with the verdict the same way will not prevent the court sending the case to a third trial on this ground, but terms as to costs were imposed: *Everett v. Bayliss*, (1882) 3 N.S.W.R. 174; and see *Fitch v. Liverpool and London Insurance Co.*, (1862) 1 S.C.R. 269.

Where the damages recovered are under £20, the court, as a general rule, will not grant a new trial, on the ground that the verdict is against evidence: *Brenan v. Russell*, (1862) 1 S.C.R. 300; *O'Connell v. Whittaker*, (1885) 1 W.N. 155; *Helmore v. Simons*, (1902) 19 W.N. 25; and see *Hoffnung v. Simpson*, (1881) 3 N.S.W.R. 133. But where there is not a tittle of evidence to support the verdict the court will set it aside (*per Stephen, J.*): *Borough of Kiama v. Charles*, (1894) 15 N.S.W.R. 497; and so where the verdict affects future rights (*ibid.*).

Powers of Court
on granting
new trial.

5 Vic. No 9,
s. 42.

**G.L.P. Act,
§. 160.**

If an unsuccessful plaintiff would on the new trial be entitled to only nominal damages, the court may refuse to set the verdict aside: *Vidal v. Temperley*, (1899) 20 N.S.W.R. 223; 16 W.N. 56; *Griffith v. Johnson*, (1903) 20 W.N. 40.

Misdirection of the Judge.—The misdirection of the presiding judge entitles the party unsuccessful to a new trial, see *Strickland v. McCulloch*, (1887) 8 N.S.W.R. 324, where *Faucett, J.*, quotes from *Prudential Assurance Co. v. Edmunds*, 2 A.C. 507: "when once it is established that a direction was not proper, either wrong in giving a wrong guide, or imperfect in not giving the right guide to the jury, when the facts were such as to make it the duty of the judge to give a guide, we cannot inquire whether or no the verdict is right or wrong as having been against the weight of evidence or not, but there having been an improper direction there must be a *venire de novo*." "This statement," says *Faucett, J.*, "carries the law to its utmost limits."

But this misdirection must be on some point material to the issue. In *McLaughlin v. The Standard Fire and Marine Insurance Company of New Zealand*, (1878) Knox. 224, it was decided that a new trial will not be granted on this ground alone even although the ruling be wrong, but under the circumstances of the case, immaterial to the points in issue. See also *Blaxland v. The Australian Steam Navigation Company* (*ibid.*), 434.

Where the question as to whether a plaintiff in an action for breach of contract should or should not have received reasonable or any notice, before termination, was essentially one for the jury, and in summing up, the judge told the jury that as a matter of law the plaintiff was entitled to notice, although he also left it to the jury to find as a matter of fact whether notice was necessary; held, that the verdict must be set aside, on the ground that the jury would consider themselves bound to adopt the ruling of the judge: *Low v. Fairfax and others*, (1899) 16 W.N. 113.

The fact that at the trial the judge, who presided, should have directed a verdict for the defendant, and did not do so, is tantamount to a misdirection, and will justify the granting of a new trial, even when the verdict is one for under £20 (*per Innes, J.*): *Borough of Kiama v. Charles*, (1894) 15 N.S.W.R. 497.

Nonsuit.—A nonsuit is proper, although there may have been some evidence to go to the jury, if the proof was such that the jury could not reasonably give a verdict for the plaintiff: *Hiddle v. National Fire Co.*, (1896) 17 N.S.W.R. 96; 12 W.N. 138.

A plaintiff cannot refuse to be nonsuited after arguing the point: *Dashborough v. Perpetual Trustee Co.*, (1890) 13 W.N. 92. Where a nonsuit was refused, and leave reserved, on the motion before the court, the court can look at the evidence for the defence: *Ostermeyer v. Harrold*, (1895) 12 W.N. 38.

A plaintiff accepting a nonsuit after decision of a point against him is not precluded from moving the court: *Rolfe v. Lea*, (1895) 16 N.S.W.R., 168; 12 W.N. 53.

Questions of misdirection, or wrongful admission or rejection of evidence must be raised at the trial; but points of law otherwise arising on the evidence may be taken afterwards: *Dwyer v. Herman*, (1881) 2 N.S.W.R. 280; see *Brown v. Fletcher*, (1884) 5 N.S.W.R. 393; *Trafford v. Pharmacy Board*, (1902) 19 W.N. 281.

Wrongful admission or rejection of evidence.—If a judge at the trial admits improper evidence, or reject evidence which ought to be admitted, by which means the result of the trial might have been different, the court will, as a rule, grant a new trial. But where the court sees that, on the evidence, independently of that improperly received, the verdict was a proper one, the court will not order a new trial on the ground of the improper reception of evidence: *Gordon v. Bank of New South Wales*, (1886) 7 N.S.W.R. 122; 2 W.N. 62; *Cross v. Goode*, (1887) 8 N.S.W.R. 255; 4 W.N. 25; *Goodsell v. National Bank*, (1890) 11 N.S.W.R., Eq. 156; 6 W.N. 154.

A new trial will not be granted because a judge allows evidence in reply which ought have been given in chief (*semble*): *R. v. Chantler*, (1891) 12 N.S.W.R. 116; 8 W.N. 10.

Where a document, rejected in evidence, was by mistake sent into the jury room, a new trial was granted on terms: *Hegherty v. National Mutual Life Association*, (1892) 8 W.N. 122.

Misconduct of jury.—The court will not grant a new trial on the ground of misconduct of a juror, where there is no clear and precise evidence before the court to show that the juror has been guilty of such misconduct: *Cox v. Bath*, (1893) 14 N.S.W.R. 263; 9 W.N. 171. See also *Clamp v. Lyne*, (1895) 11 W.N. 108.

After a verdict has been delivered in open court, statements made by some of the jurors in the hearing of their fellow jurors, and before their separation, are not receivable as evidence of misconduct in the jury room: *Brenan v. Russell*, (1862) 1 S.C.R. 300; and no evidence will be received of what passes in the jury room, (*ibid*).

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The court will hear an affidavit made by the juror who is charged with misconduct, but (*semble*) not affidavits by other jurors as to what took place afterwards in the jury room: *Perdriau v. Moore*, (1888) 9 N.S.W.R. 143; but where a plaintiff is charged with improperly conversing with a juror at a view, the affidavits of the jurors are admitted on a motion for a new trial, to show what really occurred. Where it is found that whatever conversation took place, was on immaterial points, the verdict will not be disturbed on that ground: *Slocombe v. The Municipal Council of Sydney*, (1888) 5 W.N. 14; but if the information afforded the juror be on material points, then even though the information be true, a new trial will be granted; *Smith v. Neild*, (1889) 6 W.N. 55. So, where it was shown that one of the jurors trying a collision case improperly conversed during an adjournment of the court, with one of the witnesses near the scene of the collision, as to the causes which had led thereto, a new trial was granted on terms: *Perdriau v. Moore* (*supra*); and in *McRoberts v. Carter*, (1888) 9 N.S.W.R. 458; 5 W.N. 32, where the defendant, during the trial of the action, spoke to a juror, with whom he was not acquainted, and said: "Are you going to see the land?" To which the juror replied: "I think not, but I believe we could settle the matter better by doing so." It was held that the case must go down for a new trial, *Owen, J.*, in his judgment saying: "It is imperatively necessary that jurymen and others should clearly understand that a party to an action is in no case justified in speaking to a juror during the trial, because, independently of what he may say, the very fact of his speaking to him may influence the juror in his favor."

In a case where the plaintiff spoke to a juror during the progress of the trial, but the juror refused to speak with him, it was held that this was not sufficient to disturb the verdict; but that the plaintiff should be punished with costs: *Tabrett v. Wakely*, (1889) 10 N.S.W.R. 77.

But where it can be clearly inferred from the verdict of the jury that they did not decide on the evidence, or investigate the matters in dispute, a new trial will be granted: *Conlon v. McGuigan*, (1884) 5 N.S.W.R. 205; see *Spencer v. Harris*, (1890) 11 N.S.W.R. 27; *Stevens v. London Assurance Corp.*, (1899) 20 N.S.W.R. 153.

Jury panel.—Tampering with the jury panel by one of the parties will entitle the other party to a new trial: *Parker v. Falkner*, (1889) 10 N.S.W.R. 7; 5 W.N. 57; see *Ricketson v. Barbour*, (1878) 1 S.C.R., N.S. 193.

Surprise.—In some cases, where a party is taken by surprise at the trial, the court will grant a new trial; but before this is done a clear case must be made out by the party moving: *New Zealand Insurance Company v. South Australian Insurance Co.*, (1878) 1 S.C.R., N.S. 214.

The granting of a new trial on the ground of surprise is not a matter of right but always lies in the discretion of the court: *Newcome v. Corrigan*, (1880) 1 N.S.W.R. 358, and each case must depend on its own circumstances: *Stuart v. Barayene*, (1881) 2 N.S.W.R. 315.

Excessive damages.—The courts are slow to disturb verdicts on the ground that the damages awarded were excessive, and before a new trial will be granted for this reason, it must be shown that the damages were outrageous, or calculated upon a wrong principle: *Campbell v. The Commercial Banking Company of Sydney*, (1877) Knox. 14, or that having regard to all the circumstances of the case, the court think that the damages are so large that no jury could reasonably have given them. So in a libel action, where the plaintiff was a man of proved bad character, the verdict of the jury in his favor for £200 was set aside as excessive: *Lees v. Evans*, (1891) 12 N.S.W.R. 7; 7 W.N. 98; see also *Buckle v. Hordern*, (1894) 11 W.N. 70.

Where the damages awarded bear no proportion to the position of the plaintiff and the nature of the injuries, the court will interfere and set aside the verdict, unless the plaintiff consents to reduce the amount of the verdict. Thus, where the jury awarded £3000 to an infant 4 years old, who lost her leg by a tram accident, the court reduced the verdict to £1500: *McWhannell v. The Commissioner for Railways*, (1894) 10 W.N. 101.

Absence of defendant's counsel, etc.—If the cause be tried in the order in which it is set down in the cause list, in the absence of the opposite party or his counsel the court will not grant a new trial, unless under very special circumstances; in which case, as a general rule, it would be granted only on an affidavit of merits and

G.L.P. Act, s. 160. on payment of costs; see *Weitzel v. Freidenreich*, (1897) 14 W.N. 7, where a case being called on in its turn, neither the defendant nor his counsel, nor attorney was present, and the plaintiff having obtained a verdict, the defendant moved for a new trial. *Held*, that there being no affidavit of merits, the court would not grant a new trial, even upon terms. The court in that case laying down the rule that there must be a very clear affidavit of merits before the court could act. Where, on the other hand, a case is called on and tried out of its turn, a new trial will as a rule be granted; *Martin v. Booty*, (1884) 1 W.N. 47.

Perjury of witness.—The court granted a new trial, although a previous application had been refused, where the successful party had since been convicted of perjury at the first trial: *Longworth v. Campbell*, (1882) 3 N.S.W.R. 329; see *Goldsbrough & Co., v. McMahon*, (1887) 8 N.S.W.R. 118; 3 W.N. 119.

Insanity of losing party at trial.—In a case in which the defendant, though previously unsuspected of insanity, behaved in a most eccentric manner at the trial, and was on the following day placed under restraint as insane, the jury returned a large verdict against him. A new trial was applied for, and granted on the ground that he was prejudiced by his conduct in the eyes of the jury: *Teas v. Kennedy*, (1881) 2 N.S.W.R. 55.

Cross-actions.—Where cross-actions involving the same questions of law and fact are separately tried with the result that contradictory verdicts are obtained if the evidence at each trial is so fairly balanced that a jury might reasonably find either way, both cases ought to be tried again, not separately, but together. The court in such case can neither be called upon to exercise the functions of a jury, nor to issue contradictory decrees: *Australasian Steam Navigation Co. v. Howard Smith & Sons*, (1889) 10 N.S.W.R. 150; 6 W.N. 3. If, however, one verdict is demonstrably wrong, and liable to be set aside under the ordinary rules as to new trials, it should be set aside (*ibid*).

Case governed by decisions since rule nisi granted.—For an instance of a case governed by decision given since rule nisi granted, see *McPhillamy v. Green*, (1887) 4 W.N. 31; see also on this point, *McRoberts v. Carter*, (1888) 9 N.S.W.R. 458.

Where jury return no verdict against one defendant.—Where a jury returns no verdict against one of two or more defendants, the court has no power to enter a verdict: *Hargraves v. Cohen & others*, (1873) 12 S.C.R. 310.

Rehearing a motion already argued.—The court will not rehear a motion for a new trial which has already been argued before two judges in Banco, although the judges differing no decision was arrived at or order made: *Kreff v. Hill*, (1875) 13 S.C.R. 303.

Power of court on leave reserved.—Where, at the trial, a verdict is formally entered for the plaintiff by the direction of the presiding judge, and leave is reserved to the defendant to move the Full Court to have the verdict entered for him, on such motion the court can grant a new trial: *Hennessy & another v. Rourke*, (1893) 15 N.S.W.R. 33. See now the Supreme Court Procedure Act, 1900 (*post*).

General verdict on several counts.—Where there are several counts in the declaration and the jury returns a general verdict, the verdict cannot stand unless there is evidence to support each count: *Lamb v. West*, (1894) 15 N.S.W.R. 120; see *Hodge v. Rudd*, (1902) 19 W.N. 119.

Power of Judge appealed from to sit on hearing of motion for new trial.—A judge who, by consent, formally refuses to nonsuit, is at liberty to sit on the hearing of the new trial motion: *Byrnes & another v. Western & another*, (1896) 17 N.S.W.R. 90; though on appeal against a substantial ruling he cannot sit (except on the rule nisi) under the Supreme Court and Circuit Courts Act, 1900, s. 18, (*post*).

Impose such conditions.—Terms are frequently imposed as to costs of the first trial, or of the motion, departing from the ordinary rule as stated (*infra*), **Costs.** Thus in *Perdriau v. Moore*, (1888) 9 N.S.W.R. 143, where a new trial was granted on the ground of the misconduct of a jurymen, the court ordered that if the defendant did not go to trial again the rule would be discharged without costs; but if he did, then upon his paying all the costs of the last trial within one week after taxation the rule to be made absolute without costs. See also *Hegherty v. National Mutual Life Association*, (1892) 8 W.N. 122 (*supra*); *Everett v. Bayliss*, (1882) 3 N.S.W.R. 174 (third trial); and *Bryden v. Wells*, (1897) 14 W.N. 60, where leave to amend the declaration was given and a new trial granted *ex gratia*, on terms.

Privy Council will not interfere with discretion of Supreme Court re costs.—The Privy Council will not interfere with the discretion of the Supreme Court as to costs of a motion for a new trial in such court: *Campbell v. The Commercial Banking Co. of Sydney*, (1881) 2 N.S.W.R. 375.

Direct such admissions.—Where two issues were involved in a case on the trial, which had been found by the jury in favor of the plaintiff, the court, on appeal, upheld the finding of the jury on the first issue, but ordered a new trial on the ground that evidence affecting the second issue had been improperly rejected, but in directing a new trial the court ordered the defendant to make an admission as to the former issue, so as to prevent that issue being again tried: *Denham v. Foley*, (1898) 19 N.S.W.R. 414; 15 W.N. 145; 9 B.C. 18.

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Grant such new trial on some particular point.—In *Limon v. Bennett*, (1900) 21 N.S.W.R. 164; 17 W.N. 120, on motion for a new trial by defendant in a libel action, the case was sent down for new trial merely to have the damages again assessed.

Order that the testimony of any witness, etc.—In *Conlon v. McGuigan*, (1884) 5 N.S.W.R. 207, after a rule for a new trial had been granted, one of the parties made a separate application that the evidence of a witness at the first trial, who had since died, might be read from the judge's notes. But the court held that the application ought have been made on the new trial motion.

Costs.—The ordinary rule as to costs now is that the successful party on the new trial motion gets the costs of that motion, and the costs of the first trial abile the event. But in special circumstances, special orders are made; see various cases cited (*supra*); s. 161, and R. 159 (*post*).

161. When a new trial is granted on the ground that the verdict was against evidence, the cost of the first trial shall abide the event unless the Court otherwise orders.

Costs upon new trial on matters of fact.

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s. 16.

The meaning of "costs abiding the event" is that if the same party succeed on both trials, he should have the costs of the first trial as well as the second; but otherwise the costs of the first trial shall not be allowed.

"The event" means the ultimate event of the cause. See on this question Chitty's Archbold, p. 1543.

As to when a new trial will be granted on the ground that the verdict was against evidence, see notes to preceding section, 160.

See also R. 159 (*post*).

162. (1) Upon any motion made in arrest of judgment, or to enter an arrest of judgment, or for judgment *non obstante veredicto*, by reason of the non-avertment of some fact or matter or other cause, the party whose pleading is alleged or adjudged to be therein defective, may, by leave of the Court, suggest the existence of the omitted fact or matter, or that it was proved at the trial of the cause.

Suggestion of omitted facts on motion in arrest of judgment, &c.

17 Vic. No. 21,
s. 116.

(2) Such suggestion may be pleaded to by the opposite party within eight days after notice thereof or such further time as the Court or a Judge may allow, and the proceedings for trial of any issues joined upon such pleadings shall be the same as in an ordinary action:

Provided that in cases in which the suggestion is that the omitted fact or matter was proved at the trial, if the judge before whom the cause was tried certifies that such proof was given to his satisfaction, such certificate shall be conclusive upon the parties, and judgment shall be given in accordance therewith.

See RR. 150, *et seq.*, *post*.

In arrest of judgment.—The cases in which judgment will be arrested are collected in the notes to *Hambleton v. Veere*, 2 Wms. Saund. 169, and in *Kitchenman v. Sheel*, 3 Exch. 49.

A motion in arrest of judgment may be made after judgment by default, but not after judgment on demurrer: *Edwards v. Blunt*, 1 Str. 425.

Judgment non obstante veredicto.—When judgment *non ob. ver.* will be awarded, and in what cases a replader will be ordered, see 2 Wms. Saund. 319 *d* (*h*).

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S. 162.**

Or other Cause.—In this section are introduced the words “or other cause;” from which it would appear that in every case of a motion in arrest of judgment or for judgment *non ob. ver.*, a suggestion of what is necessary to remedy the defect may be entered; and the section goes on to enact, that a suggestion of the omitted facts, “or other matter,” may be made. In *Manley v. Boycot*, 2 E. & B. 46; 22 L.J. Q.B. 265, it was held that to entitle a defendant to a rule for a suggestion under this section, such facts must be clearly and satisfactorily alleged upon affidavit as would, if added by the suggestion, make the pleading good; see also *Fisher v. Bridges*, 2 E. & B. 118; 22 L.J. Q.B. 270, and 2 E. & B. 128, n.; more fully 22 L.J. Q.B. 273, n., and *Murgatroyd v. Robinson*, 7 E. & B. 391.

Effect of judgment non obstante veredicto.—Judgment *non ob. ver.* is interlocutory. Where there are no other pleas on the record than those on which the plaintiff has obtained judgment *non ob. ver.*, and his claim is unliquidated, the plaintiff may sue out a writ of inquiry to assess his damages, without leave of the court: *Shepherd v. Halls*, 2 Dowl. 453; but if the action is only brought to recover nominal damages, as to try a right, the verdict for the defendant may be set aside by the court, and a verdict with nominal damages entered for the plaintiff: *Selby v. Robinson*, 6 T.R. 758.

These motions are not frequently made, now the parties may demur and plead; and even when there is no demurrer, but the pleading appears doubtful at the trial, it is common to reserve by consent its merits for the determination of the court, and to get the jury to assess damages contingently.

May . . . suggest, etc.—The suggestion authorised by this section may be either of facts or matter omitted from the pleading, the non-averment of which renders the pleading defective, or that such facts or matter were proved at the trial: *Rossiter v. McGuigan*, (1862) 1 S.C.R. 154; see *Ickerson v. Hayes*, (1866) 5 S.C.R. 158.

Such suggestion may be pleaded to.—The opposite party having pleaded or demurred, the case can then be carried on for decision in the usual way.

If the Judge . . . certifies.—“Under this section, the party whose pleading is defective, may also allege that the circumstances, non-averment of which are the defect thus pointed out, were proved at the trial. If this allegation were made, and issue thereon were taken by the defendant, the plaintiffs, in order to support their suggestion, would be obliged to obtain a certificate from the judge who tried the case, that such proof was then given to his satisfaction; and if the judge refused to grant this certificate, the defendant must obtain judgment. Where the evidence at the trial is conflicting or uncertain, is the judge to take upon himself the office of the jury, and certify that in his opinion the jury’s verdict ought to have been in a particular way? Or where the specific fact was not in issue, and, therefore, neither the attention of the court or the other side called to the evidence which may have been tendered in support of such fact, and which thus remains uncontradicted, is the judge to be called on to certify that such fact was *proved* at the trial? It appears to me that a judge would be very chary in granting an instrument thus conclusive in its effect. If certificates were to be granted as a general rule at the trial, there would be a constant struggle to get on the judge’s notes evidence available in the event of a future suggestion, although such evidence might be immaterial to the issues then being tried. I think, therefore, that the plaintiffs have been well advised in asking leave to amend their suggestion, by omitting the averment that it was proved at the trial, and stating only that the omitted facts are, as they allege.” (*per Stephen*, C.J. in *Rossiter v. McGuigan* (*supra*).

Judgment to follow result of suggestion.
17 Vic. No. 21, s. 117.

163. (1) If the fact or matter suggested is admitted or found to be true, the party suggesting shall be entitled to such judgment as he would have been entitled to if such fact or matter had been originally stated in pleading and proved or admitted on the trial, together with the costs of and occasioned by the suggestion and proceedings thereon.

(2) If such fact or matter is found to be untrue, the opposite party shall be entitled to his costs of and occasioned by the suggestion and proceedings thereon, in addition to any other costs to which he is entitled.

Costs of abortive issues.
Id. s. 118.

164. Upon an arrest of judgment, or judgment *non obstante veredicto*, the Court shall adjudge to the party against whom such judgment is given the costs occasioned by the trial of

any issues of fact arising out of the pleading for defect of which such judgment is given upon which such party has succeeded, and such costs shall be set off against any money or costs adjudged to the opposite party, and execution may issue for the balance if any. **C.L.P. Act, s. 164.**

The court shall adjudge.—These words are imperative; see *Von Meyer v. Taylor*, (1874) 12 S.C.R. 252.

Costs.—Formerly, if the judgment was arrested, each party paid his own costs and on a judgment *non ob. ver.* neither party was entitled to the costs of immaterial issues. Now, by this section, the party against whom such judgment is given is entitled to the costs of all issues raised upon the defective pleadings, upon which he succeeded at the trial: *Rossiter v. McGuigan*, (1862) 1 S.C.R. 154; *Cameron v. Reynolds*, Cowp. 407.

If the rule *nisi* is discharged, the party successfully showing cause is entitled to the costs of doing so, as costs the cause: *Hodgkinson v. Wyatt*, 1 D. & L. 668.

PART XVIII.

MANDAMUS AND INJUNCTION.

Mandamus.

166. The plaintiff in any action except replevin and ejectment may indorse upon the writ and copy to be served a notice that the plaintiff intends to claim a writ of mandamus; and he may thereupon claim in the declaration, either together with any other demand which may now be enforced in such action or separately, a writ of mandamus commanding the defendant to fulfil any duty in the fulfilment of which the plaintiff is personally interested. Action for mandamus
20 Vic. No. 31.
s. 34.

The "duty" that a defendant may, under this section, be commanded to fulfil must be one of a public, or quasi public nature; as well as one in which the plaintiff has a personal interest; and, therefore, a *mandamus* will not lie to compel the performance of a mere personal contract: *Benson v. Paul*, 6 E. & B. 273; but it has been held to lie at the suit of the administrator of a deceased shareholder in a company incorporated by royal charter, to compel registration of his title: *Norris v. Irish, Land Co.*, 8 E. & B. 512, where *Benson v. Paul* (*supra*), is somewhat explained; also at the suit of a shareholder in a joint stock company against the company to compel them to restore his name on the register, the company having allowed a transfer of his shares by a forged transfer deed: *Swan v. N. British Australasian Co.*, 7 H. & N. 603; 31 L.J. Ex. 425; and in Ex. Ch., 2 H. & C. 175; 32 L.J. Ex. 273.

A claim for a *mandamus* has been sustained under this section, at the suit of an architect, employed by improvement commissioners, to compel the levying a rate to defray the amount of his charges, collaterally ascertained in the same suit by the verdict of a jury: *Ward v. Loundes*, 1 E. & E. 940; 28 L.J. Q.B. 265; and affirmed in error, 1 E. & E. 956; 29 L.J. Q.B. 40. So where commissioners were authorised to borrow money on debentures on the credit of the rates they were empowered to levy, an action of *mandamus* will lie, at the suit of a debenture holder, to compel the commissioners to apply the rates in payment of his charge: *Webb v. Commissioners of Herne Bay*, L.R. 5 Q.B. 642; see also *Worthington v. Hulton*, L.R. 1 Q.B. 63; 35 L.J. Q.B. 61, and cases therein cited.

An action of *mandamus* may also be maintained by a land owner who has had notice from a railway company that they require to take his land, under the compulsory clauses of the Lands Clauses Act, 1845, to compel the company to issue their warrant to the sheriff to summon a jury to assess the value of the land: *Fotherby v. Metropolitan Ry. Co.*, L.R. 2 C.P. 188; *Guest v. Poole and Bournemouth Ry. Co.*, L.R. 5 C.P. 553. So where the company have given the six months' notice required by their special act of their intention to take land, the action can be maintained to compel the company to give a proper notice to treat under the (English) Lands Clauses

C.L.P. Act, s. 165. Act, 1845, s. 18, and all other proper notices ; and also to issue their warrant to the sheriff to summon a jury : *Morgan v. Metropolitan Ry. Co.*, L.R. 3 C.P. 553 ; affirmed in Ex. Ch., L.R. 4 C.P. 97 ; *Tyson v. Mayor of London*, L.R. 7 C.P. 18.

The action may be maintained even though no actual damage has been sustained : *Fotherby v. Metropolitan Ry. Co.*, (*supra*) per Erle, C.J.

But the courts will use their discretion as to allowing the writ to go, even though the plaintiff has a good cause of action in respect of the defendant's breach of duty : *Nicholl v. Allen*, 1 B. & S. 916 ; and in Ex. Ch., 1 B. & S. 934 ; 31 L.J. Q.B. 283 : *Guest v. Poole and Bournemouth Ry. Co.*, L.R. 5 C.P. 553, 560. In the case last cited the court refused to grant the writ without some notice to the defendants ; and held that the application for it must be on affidavit ; and it seems also that the rule is *nisi* only in the first instance.

An action of *mandamus* under this act, like the prerogative writ of *mandamus*, is not applicable where there is any other remedy at law. Thus it is not maintainable against the clerk to commissioners under a local act, for work, &c., done for them, where it is not alleged, and it does not appear, that they became indebted as such commissioners, or became otherwise than personally indebted ; or that the work &c., was in execution of the local act, or that they would have power to levy rates for payment, or that there is any charge on the rates. And even if such an action is maintainable in such a case, it is barred by the Statute of Limitations, when six years have elapsed since they became indebted : *Bush v. Beavan*, 1 H. & C. 500 ; 32 L.J. Ex. 54.

In *Trafford v. Pharmacy Board*, (1902) 19 W.N. 281, plaintiff brought an action against the Pharmacy board for damages, and a *mandamus* for not registering the plaintiff as a chemist ; but the court held that such action would not lie, as the Board had exercised discretionary or judicial functions in refusing registration.

Declaration in action for *mandamus*.
20 Vic. No. 31, s. 35.

166. The declaration in such action shall set forth sufficient grounds upon which such claim is founded, and shall set forth that the plaintiff is personally interested therein, and that he sustains or may sustain damage by the non-performance of such duty, and that performance thereof has been demanded by him and refused or neglected.

The specific amount of a debt sought to be recovered by *mandamus* need not be ascertained upon the declaration : *Ward v. Lowndes*, 1 E. & E. 940, 956.

Proceedings upon claim for *mandamus*.
Ibid. s. 36.

167. The pleadings and other proceedings in any action in which a writ of *mandamus* is claimed shall be the same in all respects as nearly as may be, and costs shall be recoverable by either party, as in an ordinary action for the recovery of damages.

As to the applicability of the Statute of Limitations by way of plea, see *Ward v. Lowndes*, 1 E. & E. 940, 956 ; and *Bush v. Beavan*, 1 H. & C. 500 ; 32 L.J. Ex. 54.

Issue of peremptory writ.
Ibid. s. 37.

168. If judgment is given for the plaintiff that a *mandamus* do issue, the Court may, besides issuing execution in the ordinary way for the costs and damages, also issue a peremptory writ of *mandamus* to the defendant commanding him forthwith to perform the duty to be enforced.

As to the discretion of the courts in awarding a writ of *mandamus* under this section, see *Nicholl v. Allen*, 1 B. & S. 934 ; and *Guest v. Poole and Bournemouth Ry. Co.*, L.R. 5 C.P. 553.

Form of peremptory writ.
Ibid. s. 38.

169. Such writ need not recite the declaration or other proceedings or the matter therein stated, but shall simply command the performance of the duty, and in other respects shall be in the form of an ordinary writ of execution, except that it shall be directed to the party and not to the Sheriff.

170. Such writ may be issued in or out of term and be made returnable forthwith, and no return thereto except that of compliance shall be allowed, but time to return it may upon sufficient grounds be allowed by the Court or a Judge either with or without terms.

C.L.P. Act, S. 170.

Return to writ.
20 Vic. No. 31,
s. 38.

171. Such writ shall have the same force and effect as a peremptory writ of mandamus, and in case of disobedience may be enforced by attachment.

Effect of mandamus.
Ibid. s. 39.

172. (1) The Court may upon application by the plaintiff, besides or instead of proceeding against the disobedient party by attachment, direct that the Act required to be done may be done at the expense of the defendant by the plaintiff or some other person appointed by the Court.

The Court may order the Act to be done at the expense of the defendant.
Ibid. s. 40.

(2) Upon the act being done the amount of such expense may be ascertained by the Court either by writ of inquiry or reference to the prothonotary as the Court or a Judge may order, and the Court may order payment of the amount of such expense and costs, and enforce payment thereof by execution.

173. Nothing herein contained shall take away the jurisdiction of the Court to grant writs of mandamus, nor shall any writ of mandamus issued out of the Court be invalid by reason of the right of the prosecutor to proceed by action for mandamus under this Act.

Prerogative writ of mandamus preserved.
Ibid. s. 41.

174. Upon application by motion for any writ of mandamus the rule may in all cases be absolute in the first instance if the Court thinks fit, and the writ may bear teste on the day of its issuing and may be made returnable forthwith whether in or out of term, but time to return it may be allowed by the Court or a Judge either with or without terms.

Proceedings for prerogative writ of mandamus accelerated.
Ibid. s. 42.

175. The provisions of this Act, so far as they are applicable, shall apply to the pleadings and proceedings upon a prerogative writ of mandamus.

Proceedings on prerogative writ of mandamus.
Ibid. s. 43.

See also the Prohibition and Mandamus Act, 1901, *post*.

Injunction.

176. In all cases of breach of contract or other injury where the party injured is entitled to maintain and has brought an action, he may in like case and manner as hereinbefore provided with respect to mandamus claim a writ of injunction against the repetition or continuance of such breach of contract or other injury, or the committal of any breach of contract or injury of a like kind arising out of the same contract or relating to the same property or right, and he may also in the same action include a claim for damages or other redress.

Claim of writ of injunction.
Ibid. s. 44.

In order to entitle a party to claim a writ of injunction under this section, three circumstances must combine:—

1. There must be a breach of contract or other injury.
2. It must be such a breach or injury as entitles the party injured to maintain an action.
3. Such action must have been commenced.

**C.L.P. Act,
S. 176.**

It would be to enter upon too wide a field to discuss the various cases in which the writ of injunction may be claimed. Its use, however, will be found chiefly in the following classes of cases : actions by reversioners for waste, such as cutting timber : actions for breaches of covenant, including, of course, the various claims on farming and other leases ; actions for infringement of prescriptive rights and easements, as ways, common, water, watercourses, and lights ; actions for nuisances of various kinds ; and actions for infringement of letters patent and copyrights. See *Mayall v. Higbey*, 1 H. & C. 148 ; 31 L.J. Ex. 329, where the defendant was restrained from continuing to make and sell reduced copies of photographs. There are few reported cases in our own courts.

A positive act, such as the pulling down a wall that obstructs light, may well be within the scope of an injunction : *Jessel v. Chaplin*, 2 Jur., N.S. 931 ; and see *Lumley v. Wagner*, 1 De G., M. & G. 601 ; 21 L.J. Ch. 898.

The granting of an injunction is not of right, upon mere proof of the invasion of a legal right ; but the circumstances of the case will be taken into consideration : *Jessel v. Chaplin* (*supra*) ; for example, in a case where an injunction was sought for the removal of a wall erected in breach of a covenant in a lease, and it appeared that the wall was erected by an under-tenant, and that the injunction if granted could not be obeyed, the writ was refused : *L. & S.W. Ry. Co. v. Webb*, 15 C.B. N.S. 450 ; where a carrier had, in a previous action, recovered against a railway company, under the equality clauses in their act, the excess of charges paid by him on packed parcels sent by their line, the Court of Exchequer refused to grant an injunction to restrain the company from continuing to impose excessive charges on like parcels : *Sutton v. S.E. Ry. Co.*, L.R. 1 Ex. 32 ; and where a plaintiff sought at once liquidated damages for breach of contract, as well as an injunction, the latter was refused : *Carnes v. Nisbett*, 7 H. & N. 778 ; 30 L.J. Ex. 348.

Upon a motion and affidavit of a plaintiff, stating that, unless the court granted the writ of injunction prayed for he would sustain considerable loss before the action could be tried, the Court of Queen's Bench in Ireland granted the writ, upon the terms that the plaintiff would speed the action, and, if the jury found for the defendant would, if the court so ordered, pay to the defendant any sum which the jury should award to him as compensation for the damages sustained by reason of the interference of the court in granting the writ : *Longfield v. Cashman*, 11 Ir. Com. Law Rep : App. xxiii., Q.B.

In *Kosten v. Haigh*, (1864) 3 S.C.R. 366, the court dissolved an injunction (which had been granted *ex parte* under the section corresponding to s. 179, *post*), where it appeared that the action (for trespass) could not be maintained ; the injunction being auxiliary to the action.

In an action for infringement of a patent and detainee of a machine, the subject of the patent, an injunction restraining the defendants from working the machine was, under the special circumstances of the case, dissolved : *Golding v. Humble*, (1865) 4 S.C.R. 310.

Costs of an interim *ex parte* injunction allowed to plaintiff finally successful : *Carter v. Cox*, (1880) 1 N.S.W.R. 95.

Injunction against a nominal defendant under the " Claims against the Government Act " refused : *Evans v. O'Connor*, (1891) 12 N.S.W.R. 81 ; 7 W.N. 130.

The injunction is at an end if the action terminates in the defendant's favour. Thus in an action of trespass, the plaintiff had claimed an injunction on the writ, and subsequently obtained an (*ex parte*) injunction ; afterwards plaintiff omitted to file a replication, and the defendant signed judgment of *non pros*. The defendant had, while the action was pending, disobeyed the injunction ; after judgment signed the plaintiff moved to attach the defendant for his disobedience ; but the application was, on this ground, refused : *James v. Armstrong*, (1891) 8 W.N. 46 ; see the same point taken, *Sunny Corner S.M. Co. v. Morgan*, (1884) 1 W.N. 91.

177. The writ of summons in such action shall be in the same form as the writ of summons in any personal action, but on every such writ and copy thereof there shall be indorsed a notice that in default of appearance the plaintiff may besides proceeding to judgment and execution for damages and costs apply for and obtain a writ of injunction.

Unless the writ of summons be indorsed with a notice as provided by this section, the court has no power to grant an injunction : *Hale v. Taylor*, (1863) 2 S.C.R. 149.

Form of writ of
summons and
indorsement
thereon ;

20 Vic. No. 31,
s. 45.

178. The proceedings in such action shall be the same as **C.L.P. Act, S. 178.** nearly as may be and subject to the like control as the proceedings in an action to obtain a mandamus under the provisions hereinbefore contained, and judgment may be given that the writ of injunction do or do not issue as justice may require, and in case of disobedience such writ may be enforced by attachment by the Court, or where the Court is not sitting by a Judge.

Form of proceedings and of judgment.

20 Vic. No. 31, s. 46.

A demurrer will not be allowed to the claim of a writ of injunction in a declaration, unless the declaration clearly shows that the remedy is inapplicable: *Bilke v. L. Chatham and Dover Ry. Co.*, 3 H. & C. 95; 33 L.J. Ex. 206. Nor can the claim be pleaded to: *Booth v. Taylor*, L.R. 1 Ex. 51.

179. (1) At any time after the commencement of the action, and whether before or after judgment, the plaintiff may apply *ex parte* to the Court or a Judge for a writ of injunction to restrain the defendant in such action from the repetition or continuance of the wrongful act or breach of contract complained of, or the committal of any breach of contract or injury of a like kind arising out of the same contract or relating to the same property or right.

Writ of injunction may be applied for at any stage.

Ibid. s. 47..

(2) Such writ may be granted or denied by the Court or Judge upon such terms as to the duration of the writ, keeping an account, giving security, or otherwise as to the Court or Judge seems reasonable and just, and in case of disobedience such writ may be enforced by attachment by the Court or where the Court is not sitting by a Judge.

(3) An order for a writ of injunction made by a Judge, or any writ issued by virtue thereof, may be discharged or varied or set aside by the Court on application made thereto by any party dissatisfied with such order.

In England, in an action for infringing a patent, the court under the corresponding section granted only a rule *nisi* in the first instance for an injunction against the defendant; and on cause being shown it will give such directions as would be given by a court of equity: *Gittens v. Symes*, 15 C.P. 362; 24 L.J. C.P. 48.

When a writ of injunction has been granted it continues to exist till it is discharged, and the plaintiff may at any time apply for an attachment in case of disobedience: *De la Rue v. Fortescue*, 2 H. & N. 324; 26 L.J. Ex. 339; but see *James v. Armstrong*, 8 W.N. 46.

This section does not apply to an action of ejectment: *Baylis v. Le Gros*, 2 C.B. N.S. 316; 26 L.J. C.P. 176.

As to costs see *De la Rue v. Fortescue* (*supra*).

An order for an injunction can only be set aside by the court, or by a judge acting as the court under 4 Vic. No. 22, s. 27: *Clayton v. Johnson*, (1886) 2 W.N. 94. See now the Supreme Courts and Circuit Courts Act, 1900, s. 20.

PART XIX.

ATTACHMENT OF DEBTS.

180. (1) Any creditor who has obtained a judgment in the Court may apply to the Court or a Judge for a rule or order that the judgment debtor be orally examined before a Judge or such Commissioner for taking affidavits as the Court or Judge shall appoint, as to his property or means available for the satisfaction of such judgment, and in particular as to any and what debts are owing to him.

Examination of judgment debtor as to his property.

Ibid. s. 26.

**C.L.P. Act,
S. 180.**

(2) The Court or Judge may make such rule or order for the examination of such judgment debtor, and for the production of any books or documents, and the examination shall be conducted in the same manner as in the case of a *viva voce* examination under the Act fifth Victoria number nine.

Act 5 Vic. No. 9, see now the Witnesses Examination Act, 1900, (*post*).

The judgment debtor.—This would now include a married woman having separate estate: *Aylesford v. G.W.R. Co.*, (1892) 2 Q.B. 626.

Examination under this section is a cross-examination: *Republic of Costa Rica v. Strausberg*, 16 C.D. 8.

Service of the rule or order should be personal, or at least it should be brought to the knowledge of the debtor: *Mason v. Muggeridge*, 18 C.B. 642.

Conduct money should be tendered: *Rendell v. Grundy*, (1895) 1 Q.B. 16, unless he is a town witness: *Wills & Dorset Bkg. Co. v. Locke*, 97 L.T.Jo. 15; the section does not apply to a corporation debtor: *Dickson v. Neath and Brecon Ry. Co.*, L.R. 4 Ex. 87.

Judge may
order an
attachment
debts.

20 Vic. No. 31,
s. 27.

181. (1) Upon the *ex parte* application of such judgment creditor, either before or after such oral examination, and upon affidavit by himself or his attorney, stating that judgment has been recovered and that it is still unsatisfied and to what amount, and that any other person is indebted to the judgment debtor and is within the jurisdiction of the Court, a Judge may order that all debts owing or accruing from such third person (hereinafter in this part called the garnishee) to the judgment debtor shall be attached to answer the judgment debt.

(2) By the same or any subsequent order it may be ordered that the garnishee shall appear before the Judge or such officer of the Court as the Judge appoints to show cause why he should not pay the judgment creditor the debt due from him to the judgment debtor, or so much thereof as may be sufficient to satisfy the judgment debt.

Judgment Creditor.—It has been held in England that a person who has obtained an order for the costs of an interpleader issue and entered it of record under s. 7 of the (Eng.) Interpleader Act, see Interpleader Act, 1901, s. 10 (*post*) is not a judgment creditor under this section: *Best v. Pembroke*, L.R. 8 Q.B. 363, distinguishing *Marples v. Hartley*, 1 B. & S. 1; 30 L.J. Q.B. 223. A person to whom money has been ordered to be paid by a court of Equity is not such a judgment creditor, *Ex p. Financial Corporation*, L.R. 4 C.P. 155. But see the Judgment Creditors Remedies Act, s. 3 (*post*). An executor of a judgment creditor who has not made himself a party to the judgment cannot proceed under the section: *Baynard v. Simmons*, 5 E. & B. 59; 24 L.J. Q.B. 253.

Still unsatisfied.—A judgment debt could not be said to be unsatisfied within the meaning of this section where the judgment debtor had been taken in execution under a *ca. sa.*: *Jauralde v. Parker*, 6 H. & N. 431; 30 L.J. Ex. 237. Where plaintiff had sued the judgment debtor on his judgment in a county court and had obtained judgment there, and an order for payment by instalments, some of which had been paid, an attachment order was refused: *Jones v. Jenner*, 25 L.J. Ex. 319.

Any other person.—This seems to include corporations, see *e.g.*, *Stewart v. Duggan* (Bank of N.S.W. garnishees), (1890) 6 W.N. 141. As to when a foreign corporation can be considered within the jurisdiction, see notes to s. 16 (*ante*).

The Crown cannot be garnisheed (*semble*): *Connolly v. Lyne*, (1887) 8 N.S.W.R. 231.

Debts owing or accruing.—The following are instances of debts held to be attachable:—

A debt of unascertained amount: *Daniel v. McCarthy*, 7 Ir. C.L.R. 251.

A debt due to one or more of several joint judgment debtors: *Miller v. Wynn*, 28 L.J. Q.B. 324.

A fixed deposit in a bank ; debt ordered to be paid out of it when payable, if the debt were not sooner paid : *Stewart v. Duggan*, (1890) 6 W.N. 141 ; see *Tapp v. Jones*, 10 Q.B. 591. **C.L.P. Act, S. 181.**

Money on current account in a bank : *Whelow v. Bale*, (1884) 1 W.N. 16.

Proceeds of a call made to provide for payment of a debt due from a company to the judgment debtor may be attached in the hands of the official liquidator : *Ex p. Turner*, 2 De G. F. & J. 354.

Rent due in the hands of a tenant : *Mitchell v. Lee*, L.R. 2 Q.B. 259.

A debt due to the estate of a deceased is attachable upon a judgment against his executor, *qua* executor : *Burton v. Roberts*, 6 H. & N. 93 ; 29 L.J. Ex. 484.

Quære : Whether dividends payable by an official assignee under the Insolvency Acts were attachable : *Evans v. Stephen*, (1882) 3 N.S.W.R. 154 ; *sed. v. infra*.

A superannuation allowance already accrued due : *Booth v. Trail*, 12 Q.B.D. 8.

Money due on an overdue p.n. : *Pierce v. Yarneberg*, (1900) 16 W.N. 145.

Money becoming due on a building contract as to which the architects' certificate was not yet given : *Sandy & Co. v. M'Carthy*, (1900) 16 W.N. 165.

Debts not attachable.—Only such debts can be attached as the debtor himself could deal with properly and without violation of the rights of other persons : *Badeley v. Consolidated Bank*, 38 C.D. 238 ; *Jones v. Freethy*, 24 Q.B.D. 519 ; *Bank of New South Wales v. Coleman*, (1898) 14 W.N. 155. See also *A.J.S. Bank v. Borough of Camperdown*, (1901) 18 W.N. 230 ; and *Lynch v. Leninge*, (1893) 14 N.S.W.R. Eq. 168 ; 9 W.N. 125.

Instances of debts held not attachable :—

Debts *bona fide* assigned by the judgment debtor before judgment : *Hirsch v. Coates*, 18 C.B. 757 ; or before the order for attachment : *Wise v. Birkenshaw*, 29 L.J. Ex. 240 ; see *Tooth v. Cooper*, (1889) 6 W.N. 75, where an order on the garnishee who had given the judgment debtor a post-dated cheque, was set aside, the debtor having previously endorsed the cheque to another person ; and *Badeley v. Consolidated Bank*, and other cases, (*supra*).

Where a judgment debt is attached, it will be subject to debtors attorney's lien : *Vaughan v. Chenhall*, (1897) 19 N.S.W.R. 123 ; 14 W.N. 163 ; so far as regards costs incurred in recovering the fund : *Lynch v. Levinge* (*supra*) ; *Bossley v. Newell*, (1902) 19 W.N. 226.

Money in the hands of a receiver under the Court of Chancery : *Amos v. Birkenhead Docks*, 20 Beav. 332 ; and see *De Winton v. Brecon, Mayor, &c.*, 28 Beav. 200.

Superannuation allowance payable, under a mere resolution of the board of directors, to a clerk of the East India Company, under 53 Geo. 3, c. 195, s. 93 : *Innes v. E. India Co.*, 17 C.B. 351, upon the ground of its being informally granted, and a mere gratuity. See *Dent v. Dent*, L.R. 1 P. & D. 306, and *Ex parte Hawker*, 7 Ch. 214 ; *Gibson v. East India Co.*, 5 Bing. N.C. 262 ; but see *Booth v. Trail* (*supra*).

Wages of a seaman or apprentice whether due or accruing : Merchant Shipping Act, 1854, 17 & 18 Vic. c. 104, s. 233.

A debt due to judgment debtors, who, by act of parliament, were bound to pay their creditors *pari passu* : *Kennett v. Westminster Improvement Commissioners*, 11 Exch. 349.

Arrears of an annuity granted by the Commissioners for the Reduction of the National Debt to the wife of the judgment debtor *dum sola* : *Dingley v. Robinson*, 26 L.J. Ex. 55.

A verdict, before judgment, in an action for breach of contract, for unliquidated damages : *Jones v. Thompson*, E.B. & E. 63 ; or in an action upon a policy of marine insurance, were attached *qua* verdict : *Dresser v. Johns*, 6 C.B., N.S. 429 ; 28 L.J. C.P. 281 ; see *Synnott v. Woods*, (1891) 8 W.N. 4.

Money paid into court in an action brought by the judgment debtor, but wherein judgment has not been obtained : *Jones v. Brown*, 29 L.T. 79, C.P., E.T. 1857.

A dividend payable in bankruptcy : *Boys v. Simpson*, 8 Ir. Com. Law Rep. 523, Ex. ; *Gilmour v. Simpson* (*ibid.*), App. xxxviii., Ex. ; *Dawson v. Malley*, Ir. R., C.L. 207, Ex. ; see *Evans v. Stephen*, 3 N.S.W.R. 154.

The mere probability of money becoming due, as in the case of accruing salary, is not attachable as an accruing debt : *Rand v. Mann*, (1893) 9 W.N. 121.

**C.L.P. Act,
S. 181.**

A debt due to the judgment debtor and another jointly : *Lloyd v. Jacobs*, (1887) 3 W.N. 144; *Macdonald v. The Tacquah Gold Mines*, 13 Q.B.D. 535; to a judgment debtor and his wife : *Cramsie v. Hunter*, (1888) 4 W.N. 131; see *Phillips v. McMahon*, 15 W.N. 206. A debt due from the judgment creditor himself to the judgment debtor cannot be attached : *O'Brien v. Watson*, (1874) 12 S.C.R. 334.

Money deposited by judgment debtor in the hands of the prothonotary on his arrest not attachable under this section : *Cummings v. Cooke*, (1867) 7 S.C.R. 17. Accrued life insurance bonuses : *Mulholland v. Body*, (1886) 2 W.N. 90.

A sum of money paid to a solicitor for an express purpose : *Lloyd v. Jacobs*, (1887) 3 W.N. 144. Money expected to become due from an administrator to the judgment debtor : *O'Neil v. Gilbert & wife*, (1884) 1 W.N. 7; see *Webb v. Stenton*, 11 Q.B.D. 518.

Money due from the Crown, although appropriated in the hands of an officer ; *Connolly v. Lyne*, (1887) 8 N.S.W.R. 232; 4 W.N. 24; see *Cullen Bullen Lime Co. v. Roseby*, (1889) 5 W.N. 52; *Magann v. Cooke*, (1884) 1 W.N. 68.

Compensation for land taken under the Railways Act where the amount is not yet ascertained : *A.J.S. Bank v. McRae*, (1887) 3 W.N. 107.

Money due on a current p.n. : *Pierce v. Yarneberg*, (1900) 16 W.N. 145.

Money in the hands of the police, taken on the person of the judgment debtor when arrested on a criminal charge : *North v. Kerry*, (1901) 18 W.N. 250.

Money the result of a "benefit performance" given for the judgment debtors in the hands of the treasurers of the fund : *Phillips v. MacMahon*, (1899) 15 W.N. 206.

Third party claiming.—There is no provision for the appearance of a third party on garnishee application, therefore persons claiming as *cestuis que trustent*, under the judgment debtor as trustee have no *locus standi* : *Bank of New South Wales v. Coleman*, (1898) 14 W.N. 155; but in *A.J.S. Bank v. Borough of Camperdown*, (1901) 18 W.N. 230, debenture holders claiming were allowed to appear.

Under the Insolvency Acts an order for attachment was set aside where the estate of the judgment debtor was sequestrated before the order for attachment was satisfied : *Ranclaud v. Cox*, (1866) 5 S.C.R. 347; see *Collins v. Conlon*, (1884) 1 W.N. 20, when on notice of insolvency of the judgment debtor, the order for payment was set aside : *McLean v. Cox*, (1887) 3 W.N. 73. And under the Bankruptcy Act 1887, payment to the judgment creditor after he had notice of an act of bankruptcy on the part of the judgment debtor, which had been followed by sequestration was set aside : *re J. G. O'Connor*, (1896), 1 B.C. 20, 40. A garnishee order was made although it was alleged that a bankruptcy petition had been presented against the judgment debtor : *Hart v. Muir*, (1889) 6 W.N. 62. But the creditor will not in any case be entitled to retain the proceeds of the attachment unless he has actually received the debt before the date of the sequestration order, and before notice of the presentation of a bankruptcy petition, or of the commission of an available act of bankruptcy : Bankruptcy Act, 1898, s. 53; see *re Trehearne*, 7 Mor. 261; *Butler v. Wearing*, 17 Q.B.D. 182.

Where a judgment was set aside, an order attaching debts was set aside also : *Stephen v. Isley*, (1884) 1 W.N. 8.

Interest.—Interest on the judgment debt added to the amount due and ordered to be paid out of the debt attached : *Whelow v. Ball*, (1884) 1 W.N. 16.

182. Service of an order that debts due or accruing to the judgment debtor shall be attached, or notice thereof to the garnishee in such manner as the Judge directs, shall bind such debts in his hands.

As against the official assignee of the judgment debtors' estate under the old Insolvency Acts or the present Bankruptcy Acts, see note to last preceding section.

Where money has been paid into court by a garnishee under a judge's order the subsequent execution of a composition deed by the debtor will not defeat the plaintiff's right to the money : *Culverhouse v. Wickens*, L.R. 3 C.P. 295.

An attachment overrides a general lien of attorney : *Hough v. Edwards*, 1 H. & N. 171; but not his right to costs of recovering judgment when that very judgment debt is garnisheed : *Vaughan v. Chenhall*, 19 N.S.W.R. 123; 14 W.N. 163; *Bosley v. Newell*, 19 W.N. 226; *Lynch v. Levinge*, 9 W.N. 125; 14 N.S.W.R. Eq. 168 (*supra*). The order served should be strictly regular : *Cooper v. Blayne*, 27 L.J. Ex. 446.

Order for attachment to bind debts.
20 Vic. No. 31,
s. 28.

183. If the garnishee does not forthwith pay into Court the amount due from him to the judgment debtor or an amount equal to the judgment debt, and does not dispute the debt due or claimed to be due from him to the judgment debtor, or if he does not appear upon summons, then the Judge may if he think fit order execution to issue, and it may be sued forth accordingly without any previous writ or process, to levy the amount due from such garnishee towards satisfaction of the judgment debt.

**C.L.P. Act,
S. 183.**

Proceedings to levy amount due from garnishee to judgment debtor.

20 Vic. No. 31, s. 29.

184. (1) If the garnishee disputes his liability, the Judge instead of making an order that execution shall issue may order that the judgment creditor shall be at liberty to proceed against the garnishee by writ calling upon him to show cause why there should not be execution against him for the alleged debt, or for the amount due to the judgment debtor if less than the judgment debt, and for costs of suit.

Judge may allow judgment creditor to sue garnishee.

Ibid. s. 30.

(2) The proceedings upon such writ shall be the same as nearly as may be as upon a writ of revivor issued under this Act.

As to writ of revivor see s. 147 (*ante*).

The dispute must be substantial: *Newman v. Rook*, 4 C.B., N.S. 434, and *bona fide*: *Wise v. Birkenshaw*, 29 L.J. Ex. 240.

A writ was refused in *Richardson v. Greaves*, 10 W.R. 45, Ex. M.T. 1861; where an action for the same cause was already pending between the judgment debtor and the garnishee, and no collusion was shown.

The costs of proceeding by writ under this section abide the event, and no order is necessary under s. 187 (*post*): *Johnson v. Diamond*, 11 Exch. 431.

If the judgment creditor declines to proceed by writ, the attachment may be discharged, and the judgment creditor be ordered to pay the costs: *Wintle v. Williams*, 3 H. & N. 288; but the court will, unless quite satisfied that the debt is not liable to attachment, allow the judgment creditor to proceed by writ: *Seymour v. Corporation of Brecon*, 29 L.J. Ex. 243.

An order was made under this section: *Trelewan v. Trelewan*, (1889) 6 W.N. 62; *Bank of N.S.W. v. Coleman*, (1898) 14 W.N. 155; *Rossiter v. Dawson*, (1862) 1 S.C.R. 55.

185. Payment made by or execution levied upon the garnishee under any such proceeding as aforesaid shall be a valid discharge to him as against the judgment debtor to the amount paid or levied, although such proceeding may be set aside or the judgment reversed.

Garnishee discharged.

Ibid. s. 31.

Semble, that payment by the garnishee to the judgment creditor, upon notice of attachment, is no discharge of the debt due from the garnishee to the judgment debtor; but there must be a judge's order for payment: *Turner v. Jones*, 1 H. & N. 878; see also *Lockwood v. Nash*, 18 C.B. 536.

Payment into court by a garnishee under a judge's order is a payment within this section and discharges the garnishee: *Culverhouse v. Wickens*, L.R. 3 C.P. 295.

See *Evans v. Stephen*, 3 N.S.W.R. 154; *Connolly v. Lyne*, 8 N.S.W.R. 331.

A garnishee order cannot be reviewed in the court of Admiralty; and therefore the payment, under a garnishee order, of costs pronounced due to a successful party by decree of the Court of Admiralty, is satisfaction of the decree: *The Olive*, 1 Sw. Adm. Rep. 423.

It has been held in Ireland, where a judgment creditor had obtained a charging order, attaching the dividends on stock in the books of the Bank of Ireland, which order had been duly served upon the Bank, that the Bank was responsible for the payment of such dividends to another judgment creditor, who, subsequently to the date of such charging order, had obtained in another court, not only another charging order attaching, but also an absolute order for the payment of such dividends: *Salaman v. Donovan*, 10 Ir. Com. Law Rep., App. xiii., Q.B.

**C.L.P. Act,
s. 185.**

See form of a plea of attachment in *Bullen & Leake's Precedents of Pleadings*, 3rd ed., p. 494.

See, as to the effect of bankruptcy, notes to s. 181 (*ante*).

Attachment
book to be kept
by the prothonotary.

20 Vic. No. 31,
s. 32.

186. There shall be kept at the office of the prothonotary of the Court a debt attachment book, and in such book entries shall be made of the attachment and proceedings thereon, with names, dates, and statements of the amount recovered and otherwise; and copies of any entries made therein may be taken by any person upon application to the prothonotary.

Costs of appli-
cation.

Ibid. s. 33.

187. The cost of any application for an attachment of debt under this part of this Act, and of any proceedings arising from or incidental to such application, shall be in the discretion of the Court or a Judge.

Costs.—"In garnishee applications, as a general rule, no order will be made as to costs. The judgment debtor should not be made to pay the costs, because he is no party to the application: *Hart v. Muir*, (1889) 6 W.N. 62. The garnishee should not be ordered to pay costs unless he in some way opposes the application; but he should not receive his costs save in exceptional cases": *Davidson v. Secombe*, (1892) 9 W.N. 1. In that case the creditor having made some mistake as to judgment debtor's name in consequence of which the garnishee was compelled to appear, the creditor was ordered to pay garnishee's costs. So where no debt was due: *Willis v. Municipality of Five Dock*, (1895) 11 W.N. 112; and where more was alleged to be due from the garnishee than in fact was due: *Heydon v. Cooke*, (1895) 11 W.N. 147. So where there was no attachable debt: *Cramsie v. Hunter*, (1888) 4 W.N. 131. In an earlier case, costs of garnishee and creditor were apparently given out of the debt attached: *Whelou v. Bale*, 1 W.N. 16; and in *Thompson v. Doyle*, (1887) 3 W.N. 69, costs of judgment creditor were given against the judgment debtor; but the garnishee was the judgment debtor's solicitor and had apparently interfered in the matter. Where the order was refused on the ground that there was no debt owing or accruing, *Darley, C.J.*, refused to give the garnishee his costs, saying that he need not have appeared; he would have been protected by the order of the court: *Rand v. Mann*, (1893) 9 W.N. 121.

PART XX.

ABSENT DEFENDANTS.

Proceeding
against absent
defendant by
foreign attach-
ment.

4 Vic. No. 6,
s. 2.

18 Vic. No. 6,
s. 2.

188. (1) If in any action the officer or person charged or entrusted with the service of the writ of summons upon any defendant makes an indorsement upon such writ to the effect that he has made diligent search for such defendant and has been unable to find him, and if afterwards there is filed on behalf of the plaintiff an affidavit stating—

- (a) the cause of action in full; and
- (b) that such cause of action arose within the jurisdiction of the Court; and
- (c) that to the best of the deponent's belief such defendant does not reside within the jurisdiction; and
- (d) that to the best of the deponent's belief such defendant is possessed of or entitled to or otherwise beneficially interested in any property in the custody or under the control of any person within the jurisdiction named in such affidavit, or that any such person is indebted to such defendant,

the plaintiff may proceed against such defendant by process of **C.L.P. Act,** foreign attachment in the manner hereinafter directed. **S. 188.**

(2) Provided that by leave of a Judge (where it appears that plaintiff may sustain injury by the delay) such affidavit may be filed before such indorsement is made upon the writ of summons.

(3) This section shall not extend to any action of ^{4 Vic. No. 6, s. 23.} trespass or other action in tort (trover or detinue excepted), but shall extend only to actions on or arising out of contract.

(4) This section shall apply to a defendant who is ^{18 Vic. No. 6, s. 3.} not within the jurisdiction at the time of proceeding hereunder, notwithstanding that he may have been within the jurisdiction at the time of issuing such writ of summons: Provided that it appears by affidavit that reasonable efforts were made and with due diligence to serve such summons on him, but without effect.

Any defendant.—This has been held to include a foreign corporation: *Brown v. Melbourne Minmi Colliery*, (1864) 4 S.C.R. 36; and see *Heron v. Californian Paint Co.*, (1884) 1 W.N. 3.

Affidavit.—"I think that all the averments in the affidavit prescribed by the Act are essential," (*per* *Faucett, J.*): *Johnson v. Poole*, (1877) Knox. 196.

Cause of action.—See notes to s. 18 (*ante*).

Arose within the jurisdiction.—See notes to s. 18 (*ante*); but see now also s. 9 of the Supreme Court Procedure Act, 1900. By that section it is enacted that "under ss. 188, 191, and 194, of the C.L.P. Act, 1899, the cause of action shall be deemed to have arisen within the jurisdiction in the case of an action arising out of contract if either (a) the contract was made within the jurisdiction, or (b) the breach thereof was made or committed within the jurisdiction wherever the contract was made." This enactment was passed in consequence of the decision in *Buckingham v. Indramayo S.S. Co.*, (1900) 21 N.S.W.R. 215; 17 W.N. 97, where the court held that "the cause of action" means whole cause of action, both contract and breach, distinguishing *Jackson v. Spittall*, L.R. 5 C.P. 542, as decided on the special wording of the section corresponding to s. 18 (*ante*); and refusing to follow *See v. Wallace*, (1890) 7 W.N. 3. The law laid down in *Jackson v. Spittall* is now made applicable to proceedings under this part of the Act.

Non-residence within the jurisdiction.—Temporary absence of defendant is enough: *McLean v. Nicholl*, (1889) 6 W.N. 71; see s. 207 (*infra*).

Property in the possession or under the control of any person.—This includes property in the custody or power of the defendant's wife, or of a co-defendant: s. 205 (*post*).

See as to the property attachable, s. 193 (*post*).

Where the defendant had absolutely conveyed property to the garnishee (really upon trust for the creditors) it was held that there was no property attachable in the hands of the garnishee: *Whiting v. Throsby*, (1872) 11 S.C.R. 134.

The existence of property here is essential to proceedings under this section: *Johnson v. Poole*, Knox. 196.

"Any Person" seems to include a corporation: *Heron v. Californian Paint Co.*, (1884) 1 W.N. 3.

The secretary of a company was garnisheed as having shares of the defendant in the company in his possession and control, and the shares were ordered to be sold: *Lansdell v. McKay*, (1884) 1 W.N. 71.

189. At any time after the filing of such affidavit, a writ of foreign attachment, in the prescribed form, may be issued at the plaintiff's instance as of course, returnable into the Court either in or out of term on some day not less than fourteen days nor more than sixty days next after the date thereof. ^{Writ of attachment. 4 Vic. No. 6, s. 3.}

See R. 271, by which the writ is to be returnable on some chamber day.

Form: see R. 272, and Form 7, Sch. 1 to Rules (*post*).

G.L.P. Act,**S. 190.**

Service of writ.
4 Vic. No. 6,
s. 3.

190. Such writ shall be served upon every person therein named (hereinafter called the garnishee) in whose hands it is intended thereby to attach any such property or debts, by delivering a copy thereof to such garnishee personally, or by leaving the same at his then or last usual place of abode.

Proviso as to
proof where
cause of action
accrued.
Ibid.

191. (1) Final judgment shall in no case be signed in any such action until an entry has been made on the record of the issue of such writ, with a suggestion of the fact that the cause of action arose within the jurisdiction of the Court.

(2) If at any time it appears that the cause of action did not arise within the jurisdiction, the attachment shall be forthwith dissolved with costs, to be paid by the plaintiff to such parties, and in such manner as the Court or a Judge shall direct.

The issue of the writ of attachment and its continued validity are the basis of proceedings under this part; so where on inquiry under s. 194 (section 6 of the old Act) it appeared that there was no attachable property in the hands of the garnishee, or where the writ of attachment was subsequently set aside on the same ground, no further proceedings can be taken, and if taken they will be set aside: *Johnson v. Poole*, (1877) *Knox* 196; *Buckingham v. Indramayo S.S. Co.*, (1900) 21 N.S.W.R. 215 17 W.N. 97.

Public notice
to be given.
Ibid. s. 4.

192. The plaintiff shall also cause a notice, in the prescribed form, of the issue of such writ of attachment, signed by him or his attorney, to be published in the Gazette, and not less than twice in one other Sydney newspaper, and the last of such publications shall be one week at the least before the day on which the writ is returnable.

See R. 272, and Form 9, Sch. 1 to Rules (*post*).

Property and
debts bound
from the time
attachment
served.
Ibid. s. 5.

193. (1) From the time of the service of such writ upon any garnishee—

- (a) all the property in the custody or under the control of such garnishee then belongs to such defendant, or to or in which such defendant is then legally or equitably entitled or otherwise beneficially interested (and whether solely or jointly with any person or persons); and
- (b) all debts of every kind then due by such garnishee to such defendant, although the same or part thereof may be payable only at a future day,

shall to the extent of such defendant's right, title, and interest therein respectively be attached in the hands of such garnishee, and (subject to any *bona fide* prior claims or liens thereon) be liable to the satisfaction of the particular demand or cause of action of which, by the said writ, such garnishee has had notice.

(2) If, at any time after such service and before the said attachment is dissolved, any such garnishee without the leave of the Court or a Judge sells or otherwise knowingly disposes of or parts with any such property, or pays over any such debt or any part thereof, excepting only to or to the use of the plaintiff, he shall, upon the application in a summary way of

such plaintiff to the Court or a Judge, and on proof of the facts, **G.L.P. Act, S. 193.** pay such damages to the plaintiff as the Court or Judge shall order.

Equitably entitled.—See *Whiting v. Throsby*, (1872) 11 S.C.R. 134.

Prior claims or liens.—Garnishees (agents for a ship) having money of the defendant (a part owner of the ship) in their hands, had recognised certain accounts for necessaries supplied, and promised to pay them on their usual pay day. *Held*, that these were "prior claims": *Hoare v. Hatfield*, (1878) 1 S.C.R., N.S. 54.

Claim of the garnishee (captain of a ship) recognised and ordered to be satisfied out of proceeds of sale: *Fink v. Warne*, (1885) 2 W.N. 18.

The garnishee has no *locus standi* to set the writ aside: *Kron v. Seattle Brewing Co.*; *Young & Gollin*, garnishees, (1903) 20 W.N. 5.

194. (1) Upon the return of such writ of attachment, or as soon after as conveniently may be, the Court or a Judge shall proceed to inquire and determine—

Inquiry as to property in garnishee's hands.

4 Vic. No. 6, s. 6.

- (a) whether in fact the plaintiff's cause of action arose within the jurisdiction of the Court, and if so; then,
- (b) what property (sufficient, or not more than sufficient to satisfy the plaintiff's cause of action, together with his costs of suit), then is or was at the time of the service of the said writ in the custody or under the control of any such garnishee, belonging to such defendant, or to or in which he was at that time entitled or interested as aforesaid; and
- (c) what debts were then due to such defendant from any such garnishee, and the particulars thereof, and
- (d) whether such property and debts, or any part or parts thereof, are or can be made available for the purpose of making such satisfaction as aforesaid, and to what amount respectively.

(2) For the purposes of such inquiry and determination, the Court or Judge may in a summary way examine or permit the plaintiff to examine *viva voce* upon oath every such garnishee, together with such witnesses (if any) as the Court or Judge may think proper to be so examined, and for that purpose may make such orders and issue such summonses to the several garnishees and witnesses as may in that behalf be deemed expedient.

Examination of Garnishee.—On the examination of the garnishee, the garnishee is entitled to be represented by counsel, it being in the discretion of the judge to determine the extent of counsel's interference: *Whiting v. Throsby*, (1872) 11 S.C.R. 134; *Hoare v. Hatfield*, (1878) 1 S.C.R., N.S. 54.

In *Briscoe v. Hawkins Hill G.M. Co.*, (1886) 2 W.N. 51, *Fawcett*, J., refused to allow counsel for the garnishee to appear; but the cases above mentioned were not cited.

And see *Kron v. Seattle Brewing Co.*, (1903) 20 W.N. 10.

195. (1) Any garnishee or witness who refuses or neglects to attend according to the exigency of such writ of attachment, or to obey any such order or summons, or refuses to be so examined, shall be liable to be summarily proceeded against as in cases of contempt of Court and to be punished accordingly.

Attendance of garnishees and witnesses. *Ibid.*

(2) Provided that in any case where, under the circumstances, it appears to be reasonable or just so to do, the Court or a Judge may dispense with the attendance of any garnishee

C.L.P. Act, upon his submitting to be examined upon oath before a Commissioner of the Court, or upon such other terms as the Court or Judge shall impose.

(3) Where any garnishee attends in obedience to any such writ or summons, the Court or Judge may award him the reasonable expenses of such attendance, to be paid by the plaintiff.

The garnishee is given his costs against the plaintiff: *Fink v. Warne*, (1885) 2 W.N. 18, where the property was ordered to be sold; and in *Hoare v. Hatfield*, (1878) 1 S.C.R., N.S. 54; and *Mills v. Hurley*, (1883) T.T.R. 147, where the attachment was dissolved. In *Whiting v. Throsby*, (1872) 11 S.C.R. 134, though the court held there was nothing they could attach, no order as to costs was made.

Disposal of property by leave of Court.
4 Vic. No. 6, s. 7.

196. (1) If any garnishee in whose hands any such property or debt has been so attached is desirous of disposing of the same or any part thereof, or of receiving or paying (as the case may be) the amount of any bill, bond, or debt, or other chose in action, or any part thereof pending such attachment, the Court or a Judge, on the application of such garnishee, due notice thereof having been given to the plaintiff, may authorise such garnishee to sell or dispose of any such property or to receive or pay any such amount.

(2) The proceeds of such sale or disposal, or the amount so received or paid (as the case may be), shall be thereafter held by such garnishee, or be paid into Court or invested, or otherwise be detained or appropriated subject to such attachment as aforesaid, or otherwise for the satisfaction of the plaintiff as the Court or Judge shall order.

See *Eldred v. Black*, (1880) 1 N.S.W.R. 45.

After attachment returned plaintiff may proceed in the action.
Ibid. s. 8.

197. At any time after the return day of any such writ of attachment, the plaintiff may cause an appearance to be entered for the defendant against whom such writ has so issued, and may proceed thereon in the action as if such defendant resided in Sydney and had appeared to such action in person: Provided that such bond as is hereinafter in that behalf prescribed has been first duly entered into.

But the writ of attachment must be valid and effectual, otherwise no further proceedings can be taken: *Buckingham v. Indramayo S.S. Co.*, note to s. 191 (*supra*).

Bond: Sect. 199 (1) (*infra*).

Court to determine what property is to continue subject to attachment.
Ibid. s. 9.

198. (1) So soon as upon any such examination or inquiry as aforesaid it is ascertained by the Court or Judge what property and debts as aforesaid can (consistently with existing liens or prior claim thereon, to be determined by the Court or Judge) be made available for the purpose of making satisfaction to the plaintiff as aforesaid, the Court or Judge shall forthwith order the same (or such part or parts thereof respectively as the Court or Judge thinks proper in that behalf)—

(a) to be thenceforward holden for that purpose and to continue subject to such attachment accordingly; or

(b) to be sold or otherwise disposed of if the Court or Judge thinks fit, and the proceeds, or (in case of debts then payable) the amounts of such debts, to be paid into the hands of some officer of the Court subject to such attachment as the Court or Judge may order.

(2) With respect to all and singular the property, debts, and other choses in action to which no such order as aforesaid is intended to apply, or as to which no such order can be made, the Court or a Judge may at any time direct that the said attachment shall be dissolved. **G.L.P. Act, s. 198.**

(3) Provided that where more than one writ of attachment has issued against the same garnishee, or the same property or debt has been attached at the suit of more than one plaintiff, the Court or a Judge may award and determine how much and what parts of the property or debt so attached or to what amount in value thereof shall be retained or holden under each of such writs, or be paid into Court or disposed of (as the case may be) for the separate benefit of each plaintiff. Proviso as to any second writ.

(4) As to writs lodged with the sheriff on the same day the plaintiffs therein shall be entitled to satisfaction *pari passu*, but as to writs lodged with the sheriff on different days the plaintiffs shall be entitled to satisfaction respectively according to priority of each in such lodgment.

Order for sale made : *Fink v. Warne*, (1885) 2 W.N. 18; for sale of part of property attached : *Heron v. Californian Paint Co.*, (1884) 1 W.N. 3.

Sale was ordered in *Hoffnung v. Allan*, (1887) 3 W.N. 86, after an adjournment to give defendant's agents notice of the application.

In *Lansdell v. McKay*, (1884) 1 W.N. 71, so much of the attached property as would satisfy the claim of the plaintiff was ordered to be sold.

199. (1) Within fourteen days next after any such writ of attachment has issued, the plaintiff at whose suit the same has issued, or if he is absent some person on his behalf, shall before a Judge or a Commissioner of the Court enter into a bond with two sufficient sureties to be approved of by such Judge or Commissioner, acknowledging himself and themselves to be bound to the defendant against whom such writ has so issued in such sum as a Judge shall think fit to order, conditioned amongst other things to repay all such sums as the said plaintiff shall recover in the action in case the judgment therein is thereafter vacated, reversed, or altered, together with all costs sustained by such defendant. Plaintiff to enter into a bond to account, &c. 4 Vic. No. 6, s. 10.

(2) Such bond and condition shall be in the prescribed form, and in case of any breach or alleged breach of such condition such defendant may sue the parties to such bond thereon at any time.

(3) If such bond be not so entered into, the attachment shall be *ipso facto* dissolved.

See R. 272 and Form 10, Sch. 1 to Rules (*post*).

200. At any time after such bond has been so entered into, and after the plaintiff has obtained final judgment, he may— After judgment plaintiff may issue fieri facias. Ibid. s. 11.

- (a) cause a writ or writs of *fiery facias* upon such judgment to be from time to time issued as in any ordinary case for the amount of the debt or damages and costs thereby recovered ; and
- (b) cause to be taken in execution under any such writ (as against such defendant) not only all or any part of the property or debts so attached which then continue sub-

**C.L.P. Act,
S. 200.**

ject to such attachment as aforesaid, in whose hands soever such property then is (and whatever is the nature of such property whether ordinarily liable to be taken in execution or not, and although the same or part thereof is of the nature of a chose in action), but also any other property of or debts due to such defendant which the plaintiff is then able to find; and

- (c) receive any such property in satisfaction or part satisfaction of such debt or damages and costs at an amount to be fixed by the sheriff, or cause all such property (except as next mentioned) to be sold under such writ or writs as in ordinary cases :

Provided that with respect to any such debt or other chose in action so taken in execution no sale or other disposition thereof shall take place except by order of the Court or a Judge.

Compelling payment of debts due to defendant under attachment.

4 Vic. No. 6, s. 11.

201. Upon the application of the plaintiff the Court or a Judge may at any time in a summary manner—

- (a) authorise an action for the amount of any such debt to be brought in the name of the creditor being such defendant as aforesaid ; or
- (b) cause the debtor to be summoned to attend the Court or a Judge to show cause why he should not forthwith pay the amount of such debt to the plaintiff, and if no sufficient cause be shown may order such payment accordingly, and enforce such order, together with all costs attending the same, by an attachment for a contempt as in other cases.

This section seems to refer to both debts attached and to other debts referred to in the preceding section ; although the side note speaks of debts under attachment only.

Probably the procedure adopted would be to proceed under subs. (b) first ; then if the alleged debtor disputed his debt, take an order allowing the plaintiff to bring an action (in the name of the defendant in the original action) against the alleged debtor.

Provision for dissolving foreign attachment.

Ibid. s. 12.

202. (1) If pending any such writ of foreign attachment, or at any time before final judgment obtained in the action in which such writ issued, the defendant against whom such writ has issued, or any person on his behalf, enters before a Judge into a bond with two sufficient sureties to be approved of by such Judge, acknowledging himself and themselves to be bound to the plaintiff in such sum as the Judge thinks fits to order, conditioned to pay the plaintiff the amount of such debt or damages and costs as he shall at any time thereafter recover in such action, then such defendant or person upon entering an appearance (or if such appearance has previously been entered by the plaintiff then upon filing pleas therein) may defend such action, and upon giving notice thereof to the plaintiff may apply to the Court by motion as of course that the said attachment may be dissolved, and the same shall be dissolved accordingly.

(2) The action shall thereupon proceed to trial and judgment in the ordinary manner.

203. (1) If, after any final judgment obtained as aforesaid, an affidavit is made by the defendant against whom such writ has issued as aforesaid that such defendant had at the time of the obtaining of the said judgment, and still has a substantial ground of defence on the merits (either wholly or in part) to the plaintiff's action, and such affidavit is filed in the Court at any time before the expiration of three years next after such judgment, then upon motion made on behalf of the said defendant after due notice thereof given to the plaintiff (and security being entered into for the payment to the plaintiff of all costs by him at any time thereby sustained) the Court may cause the merits so alleged as aforesaid to be inquired into and determined in such manner and form, either by a feigned issue between the parties or otherwise, and at such time and under such terms and conditions for the purpose of securing the substantial ends of justice as to the Court seems meet.

**C.L.P. Act,
S. 203.**

Absent defendant may come in and defend notwithstanding judgment.

4 Vic. No. 6, s. 13.

(2) Every such affidavit, if made out of the jurisdiction of the Court, shall be sworn before a Judge or Master of some Court of Law or Equity, or the Chief Magistrate of some city or corporate town certified under the hand and seal of such Magistrate.

204. (1) The Court, after such inquiry and determination had, shall thereupon give such judgment in the matter for the reversal of the judgment in the original action either in the whole or in part, or shall from time to time make such order or orders in the premises between the parties as the justice of the case appears to require.

Judgment in such cases.

Ibid.

(2) Every such judgment and order may at any time (if the party succeeding thinks fit) be suggested upon or added to the record of the original action in which such final judgment has been so obtained as aforesaid.

205. (1) The property of any such absent defendant as aforesaid, may, under the provisions of this Part of this Act, be attached and taken in the custody or power of the defendants' wife or of any co-defendant.

Property in possession of any co-defendant, wife, &c.

Ibid. s. 14.

(2) No process of foreign attachment against any such absent defendant, nor any lien intended to be thereby created upon the property or debts thereby attached, shall be defeated by reason of such co-defendant or any other garnishee as aforesaid being or claiming to be jointly interested with such defendant therein either as partner or otherwise.

(3) In all cases it shall be sufficient for the purposes of this Part of this Act to attach property in the hands of the person having the actual care, custody, or control thereof for the time being.

206. (1) Every writ of attachment upon which any order is made as aforesaid, where the same has been followed by execution levied, may be pleaded in bar by any person in whose hands any property or debt as aforesaid has been attached, to any action brought by or on behalf of the defendant for the recovery of such property or debt.

Attachment and execution may be pleaded in bar.

Ibid. s. 22.

**G.L.P. Act,
S. 206.**

(2) If any such action is brought pending the attachment, the same shall be stayed by order of the Court or a Judge until the attachment is dissolved or the proceedings thereupon are otherwise determined.

(3) In such plea it shall be necessary only to state shortly that such writ of attachment was issued, and to set out the substance of the order finally made thereon, and then to allege that the property or debt sought to be recovered was taken under a writ of execution issued after such order.

Meaning of
"absence."

4 Vic. No. 6,
s. 24.

207. Absence from the jurisdiction of the Court shall for the purposes of this Part of this Act be taken to mean absence for the time being whether the party has ever been within the jurisdiction or not.

Powers as to
adjournments
and costs.

Ibid. s. 25.

208. In all cases of applications made to or proceedings had or taken before or by authority of the Court or a Judge or otherwise under this Part of this Act, the Court or a Judge may adjourn the case or proceedings from time to time, and award costs to be paid by such party to such party, or refuse costs, as the Court or Judge thinks fit.

PART XXI.

EJECTMENT.

Writ.

Ejectment to
be brought by
writ.

17 Vic. No. 21,
s. 119.

209. Every action of ejectment shall be commenced by writ, directed to the persons in possession by name, and to all persons entitled to defend the possession of the property claimed, which property shall be described in the writ with reasonable certainty.

The writ by which the action is to be commenced is to be directed to the person in possession, that is, in actual possession of the premises. As to service, see s. 212 (*infra*).

A distinction must be here drawn between what constitutes, in the eye of the law, an actual, and what a vacant possession. Thus land illegally converted into a road, by trustees under an act of parliament, is not in their possession, so as to make them tenants in possession : *Doe d. White v. Roe*, 8 Dowl. 71.

Where the person has removed from the premises, but had left beer in the cellar, it was held that the plaintiff or claimant could not proceed as on a vacant possession : *Savage v. Dent*, 2 Str. 1064. So if hay is left in a barn (*ibid.*) ; and if the residence of the tenant of land, where there is no house, is known, he must be served (*ibid.*). But if the tenant has locked up and quitted the house, the plaintiff may proceed as on a vacant possession : *Doe d. Portarlington v. Roe*, 4 B. & C. 259. So if the house has been pulled down : *Doe d. Norman v. Roe*, 2 Dowl. 399, 428 ; and so if the premises are untenanted, and there is no property in them,—unfinished houses, for instance : *Doe d. Schovell v. Roe*, 3 Dowl. 691. But the possession in such cases must be clearly vacant ; it must appear that there are no tenants in possession : *Doe d. Burrows v. Roe*, 7 Dowl. 326. If some of the houses only are vacant, and if they are included in the lease with others, the claimant cannot proceed as on a vacant possession : *Doe d. Timothy v. Roe*, 8 Scott. 126. The court, in such circumstances, granted a rule *nisi*, and directed service to be effected by sticking up copies of the declaration and notice, and also by serving them on the parties who were shown to be interested : *Doe d. Chippendale v. Roe*, 7 C.B. 125. In a case of vacant possession, service of a writ of ejectment addressed "to the assignees and personal representatives of A.B. deceased," by posting copies upon the premises, was held good : *Harrington v. Bytham*, 2 C.L.R. 1033.

Provided the writ is served on the persons in possession, an absolutely correct statement of the names will not be of importance: *Doe d. Frost v. Roe*, 3 Dowl. 563: and see *Doe d. Foulkes v. Roe*, 2 Dowl. 567, where the tenant was called *Jacob* in the notice of declaration instead of *Sarah*. In *Doe d. Peach v. Roe*, 6 Dowl. 62, in ejectment against several tenants, *Tindal*, C.J., said, that each tenant in possession should be rightly named in his own notice. Notices addressed to "Mrs. Martin" and "Mrs. Gough" have been, however, held sufficient, it being sworn that they were personally served, and were the tenants in actual possession, and that their christian names were not known: *Doe d. Smith v. Roe*, 6 Dowl. 629. The cases are collected in *Cole*, p. 83. Service on a person in possession not named in the writ; *quare*, whether this was not merely an irregularity and amendable: *Thompson v. Slade*, 25 L.J. Ex. 306.

**G.L.P. Act,
s. 209.**

Want of the "reasonable certainty" required in the description of the property will not nullify the writ; but it will afford ground for an application for better particulars: s. 217 (*post*). As to what formerly constituted a sufficient description of the property, see *Cole*, p. 85; and as to obtaining the better particulars see *Doe d. Saxton v. Turner*, 11 C.B. 896.

No other cause of action can be joined with ejectment: s. 49 (*ante*).

Injunction.—Plaintiffs having commenced an action of ejectment obtained (*ex parte apparently*) an injunction restraining the defendant "from going on and remaining on the said land, &c." On motion by the defendant the injunction was dissolved, as it would be a novel and speedy way of obtaining judgment in an action of ejectment: *Union Bank v. Green*, (1900) 16 W.N. 224.

Where judgment has been obtained, but before *ha. fa.* issued, the defendant began to remove buildings: plaintiff issued a writ in trespass and obtained an injunction, but the court dissolved it, the plaintiff having no possession to support an action of trespass: *Kosten v. Haigh*, (1864) 3 S.C.R. 366.

210. (1) The writ shall be in the Form No. 21 contained in the Second Schedule hereto, or to the like effect, and shall—

Form and duration of writ of ejectment.

- (a) state the names of all the persons in whom the title is alleged to be; and
- (b) command the persons to whom it is directed to appear within sixteen days after service thereof in the Supreme Court to defend the possession of the property claimed, or such part thereof as they may think fit; and
- (c) contain a notice that in default of appearance they will be turned out of possession.

17 Vic. No. 21, s. 120.

(2) The writ shall bear teste of the day on which it is issued, and shall be in force for three months.

As to venue, see s. 109 and notes thereto (*ante*).

If the writ is incorrect in any particular, an amendment may be had in a proper case under s. 20 (*ante*); see *Lehane v. Johnson*, (1899) 16 W.N. 46.

As to the parties to be made plaintiffs, see *Cole*, p. 74; as to defendants, *Cole*, p. 75, and s. 209 (*supra*).

Sixteen days: but see now R. 34 (*post*).

Where the guardian in socage has not entered, an infant under the age of fourteen years may maintain ejectment: *Jenkins v. Harris*, (1865) 4 S.C.R. 129.

Tenants in common may issue a joint writ to recover the possession of the property: *Elliss v. Elliss*, E.B. & E. 81; 27 L.J. Q.B. 316.

211. The name and abode of the attorney suing out the writ, or if no attorney, the name and residence of the claimant, shall be indorsed thereon in like manner as hereinbefore enacted with reference to the indorsements on a writ of summons in a personal action, and the same proceedings may be had to ascertain whether the writ was issued by the authority of the attorney whose name is indorsed thereon, and who and what the claimant

Indorsement of name and abode of attorney or claimant.

Ibid.

C.L.P. Act, S. 211. is and his abode, and as to staying the proceedings upon writs issued without authority, as in the case of writs in personal actions.

See ss. 8, 9 (*ante*).

Service of writ.

17 Vic. No. 21,
s. 121.

212. The writ shall be served in the same manner as an ejectment was served before the commencement of the Common Law Procedure Act of 1853, or in such manner as the Court or a Judge shall order, and in case of vacant possession by posting a copy thereof upon the door of the dwelling-house or other conspicuous part of the property.

The service of the writ must be effected by the delivery of a copy of the writ (the original writ being exhibited, if required, at the same time) to the tenant himself, or to his wife, or to some member of his family, in which latter cases it must be shown that the writ came to his knowledge. The writ had better be read over and its nature explained; and the fact of this having been done should be stated in the affidavit of service.

As many copies as there are persons named in the writ must be made, and a copy served on each person so named. Acceptance of the copy of the writ by the person to be served is not necessary. It is enough that the copy is tendered, and its nature stated: *Doe d. Courthorpe v. Roe*, 2 Dowl. 441; but the nature of the proceeding need not be stated, if the party, by his acts, dispenses with or prevents it: *Doe d. George v. Roe*, 3 Dowl. 541.

Personal service on the tenant in possession himself, may be made on the premises or elsewhere: *Savage v. Dent*, 2 Str. 1064; and either within the jurisdiction of the court, or abroad: *Doe d. Daniel v. Woodruffe*, 7 Dowl. 494.

The service must be on the person in actual possession, to whom the writ is directed; that is, on the sub-tenant (for instance), in ejectment by landlord against tenant, where the premises have been sub-let: *Doe d. Darlington v. Cock*, 4 B. & C. 259.

Showing the writ to the tenant on the premises, and telling him the nature of it, is good service if the tenant goes away and refuses to listen: *Doe d. Roberts v. Roe*, 6 Sc. N.C. 833. So if the writ is shown to the tenant off the premises, and attempts are made to serve him with a copy and to explain the matter, and a copy is afterwards left for him on the premises with a servant, it is good service: *Doe d. Hope v. Roe*, 3 C.B. 771. So if the person serving the writ, after stating his business, is turned out of the house when he is attempting to serve the writ, a copy thrust under the door will be good service: *Doe d. Frith v. Roe*, 3 Dowl. 569. So if the other parties eject the process-server from the presence of the tenant in possession, and prevent the complete service: *Doe d. Mann v. Roe*, 11 M. & W. 77.

Service on the wife of the tenant, either on the premises: *Goodright v. Thrustout*, 2 W. Bl. 800, or at the husband's house, is sufficient: *Doe d. Graef v. Roe*, 6 Dowl. 456. The reason that it is necessary to state in the affidavit that service on the wife was at the husband's house, is to show that they were living together as man and wife: *Doe d. Moreland v. Bayliss*, 6 T.R. 765. It is enough if the woman on the premises stated herself to be the wife of the tenant, and the person serving the writ swears that he believes such statement to be true: *Doe d. Grange v. Roe*, 1 Dowl. N.S. 274. An affidavit of service on the wife should state (if possible) that the wife was living with the husband at the time: *Doe d. Boullot v. Roe*, 7 Dowl. 463.

Service of the declaration and notice might, by the former practice, have been effected by leaving the copy with a child, servant, or other member of the family of the tenant; but it was necessary that the service effected in this manner should be on the premises themselves; and that the fact of the declaration and notice having come to his hands before the term should have been subsequently acknowledged by the tenant himself: *Doe d. Ginger v. Roe*, 9 Dowl. 336; *Doe d. Royle v. Roe*, 5 C.B. 256, 258, where the more recent cases are collected: *Doe d. Watson v. Roe*, 5 C.B. 521. If an acknowledgment to that effect had been made by the tenant's wife only, it afforded ground for a rule nisi for judgment: *Doe d. Chaffey v. Roe*, 9 Dowl. 100; and see *Doe d. Royle v. Roe*, (*supra*).

Where the tenant had become bankrupt a service on the messenger in possession of the premises, and on the official assignee, was held insufficient: *Doe d. Baring v. Roe*, 6 Dowl. 456.

Where the tenant had died, a service on the widow in possession, who was administratrix, was held sufficient : *Doe d. Pamphilon v. Roe*, 1 Dowl. N.S. 186. Where a servant of the deceased remains in possession, the claimant ought to endeavour to obtain possession ; and if the servant resists, he may be treated as tenant : *Doe d. Atkins v. Roe*, 2 Chit. 179.

**C.L.P. Act,
§. 212.**

If the tenant is a lunatic, the service should be on his committee, if he has one, and not a servant : *Anon. Loftt*, 461. If there is no committee, service on the lunatic is sufficient : *Doe d. Gibbard v. Roe*, 9 Dowl. 844. As to the course to be adopted for serving a lunatic in an asylum, *vide ante*, s. 17, note. Service on a lunatic's daughter, who conducted the lunatic's business, was held insufficient : *Doe d. Brown v. Roe*, 6 Dowl. 270.

Service on one of several joint tenants is sufficient : *Doe d. Clothier v. Roe*, 6 Dowl. 291 ; so is service on one of several partners : *Doe d. Overton v. Roe*, 9 Dowl. 1039 ; *Doe d. Bennett v. Roe*, 7 C.B. 127.

If there are several tenants in possession, a copy of the writ ought to be served on each : B.N.P. 98 ; and *Doe d. Ld. Darlington v. Cock*, 4 B. & C. 259. If the service is on the original tenant, where there are several sub-tenants, and he appears and defends, he cannot afterwards object that the sub-tenants, and not himself, were in possession : *Roe v. Wiggs*, 2 N.R. 330. Service on a landlord, sub-letting to weekly tenants, and occupying no part of the premises himself, is not sufficient : *Doe d. Hubbard v. Roe*, 2 Har. & Woll. 333 ; *aliter* if the premises have been for some time unoccupied ; *Doe d. Hayne v. Roe*, 2 Will. Wol. & Dav. 72.

As to service on public companies, see the observations as to the service of writs of summons : s. 17, note, *ante* ; *Doe d. Bromley v. Roe*, 8 Dowl. 858 ; and *Doe d. Bayes v. Roe*, 16 M. & W. 98.

Appearance and proceedings in default of appearance.

213. The persons named as defendants in such writ or either of them may appear within the time appointed.

Appearance of persons named in the writ.

The appearance of the tenant or tenants in possession to the writ should be in the form prescribed by s. 29. An appearance by a landlord must be according to s. 215 (*post*).

17 Vic. No. 21, s. 122.

A defendant may appear to defend as to part of the property claimed : s. 216, (*post*).

Notice of appearance should now be given in all cases : R. 35 (*post*).

See generally as to appearance, ss. 27—30 (*ante*).

214. Any person not named in such writ may by leave of the Court or a Judge appear and defend, on filing an affidavit showing that he is in possession of the property either by himself or his tenant.

Appearance of persons not named.

Ibid. s. 123.

Notice of appearance should be given, R. 275 (*post*).

This section is more general than the English Act, 11 Geo. 2, c. 19, s. 13 ; which permitted the landlord to make himself defendant in ejectment, and which was in force in this colony : *Glasson v. Egan*, (1866) 6 S.C.R. 87. The word "landlord" in that section has been construed to include all persons claiming title consistent with the possession of the occupier. Thus the court permitted a mortgagee out of possession to be made defendant : *Doe d. Tilyard v. Cooper*, 8 T.R. 645 ; but in such a case a mortgagee must show that he has a *bona fide* interest in the result : *Doe d. Pearson v. Roe*, 6 Bing. 613. An heir who had never been in possession : *Doe d. Heblethwaite v. Roe*, 3 T.R. 783, n. ; and a devisee in trust in the same position : *Lovelock v. Dan-caster*, 4 T.R. 122 ; were admitted to defend ; so under this section, the sub-lessee of three private boxes in a theatre was allowed to come in and defend, to the extent of his interest, an ejectment by the lessor against the lessee of the theatre for forfeiture : *Croft v. Lumley, Ex parte Lord Ward*, 4 E. & B. 608 ; but a *cestui que trust*, who had never been in possession, was not admitted : *Lovelock v. Dan-caster*, 3 T.R. 783 ; under the previous enactment. And under this section, an *elegit* creditor of a lessee who had executed the *elegit*, but who had not had actual possession delivered under a writ of possession, is not entitled to appear and defend an ejectment by the lessor against the lessee for forfeiture : *Croft v. Lumley, Ex parte Hughes*, 4 E. & B. 614 ; *Thompson v. Tomkinson*, 11 Exch. 442. And a mere remainderman has been refused leave to appear upon the ground that possession, either by himself or by his tenant, must be shown by an applicant under this section : *Whitworth v. Humphries*, 5 H. & N. 185.

**C.L.P. Act,
S. 214.**

Where a person claims in opposition to the title of the tenant in possession, it would be unjust to make him a co-defendant; the defences might clash: *Driver v. Lawrence*, 2 W. Bl. 1250. No person claiming adversely will be admitted to defend: *Doe d. Horton v. Rys*, 2 Y. & J. 88; and if admitted, the claimant may apply (under s. 218, *post*) to strike out the appearance. But if the claimant does not do so, and the party continues on the record, he will not be allowed to set up such inconsistent title as a defence at the trial: *Doe d. Mee v. Litherland*, 4 Ad. & E. 784; *Doe v. Challis*, 17 Q.B. 166; 20 L.J.Q.B. 478.

The order may be made *ex parte*: *Sempill v. Rashleigh* (1865) 4 S.C.R. 184.

Landlord and Tenant.—By s. 7 of the Landlord and Tenant Act, 1890, every tenant on whom a writ in ejectment is served or to whose knowledge it comes, is bound to give notice of such writ to his landlord or his bailiff, or receiver, under penalty of three years rent of the premises, to be recovered against him.

Ejectment as between landlord and tenant is now dealt with under that Act (Landlord and Tenant Act of 1890), ss. 8—15; and between mortgagee and mortgagor by the Conveyancing and Law of Property Act 1898, ss. 106, 107. See these sections of these Acts printed after s. 251 (*post*). See also the Forfeiture of Leases Act (*post*).

It is not necessary for the landlord to become a defendant in order to make his title admissible in evidence. He may, with the tenant's consent, defend in the tenant's name. In an action so defended, where the claimant, having knowledge thereof, obtained from the tenant a *retraxit* of the plea, and a *cognovit* of the action, the court set aside the judgment: *Doe d. Locke v. Franklin*, 7 Taunt. 9.

As to liability for costs, where ejectment is defended in the name of tenant by strangers, see *Hutchinson v. Greenwood*, 4 E. & B. 324; 24 L.J. Q.B. 2. See further as to the liability of strangers claiming or defending to costs: *Waldron v. Mitchell*, (1892) 13 N.S.W.R. 163; 8 W.N. 117.

The affidavit of a person applying for leave to appear and defend must show that he is in possession of the premises. In an action brought to enforce an *elegit*, a corporation was not permitted to defend without admitting themselves to be in possession; although the defence was, that the premises were not possessed by them for any but public purposes, and, therefore, were not liable to execution: *Doe d. Parr v. Roe*, 1 Q.B. 700; see also *Doe v. Challis*, 17 Q.B. 166; 20 L.J. Q.B. 478; *Croft v. Lumley, ex parte Hughes*, 4 E. & B. 614.

Where the person applying for leave to appear and defend resides abroad, he may be required to give security for costs: *Doe d. Hudson v. Jameson*, 4 Man. & Ry. 470; but it would seem that if the application be made in due time, terms cannot now be imposed upon a landlord who shows himself to be in possession by his tenant: *Butler v. Meredith*, 11 Exch. 85.

The application for leave to appear and defend should be made as soon as the person has notice of the writ, so that an appearance may be entered within the sixteen days allowed for doing so, and, if possible, before judgment. Further time to appear, and a stay of proceedings, may possibly be obtained from a judge at chambers, should either be necessary. If judgment has been signed, (s. 219 (*post*)), the application must also be to set aside the judgment.

The court will not allow the possession to be changed where there has been no trial or opportunity of trying the cause; and therefore will set aside a regular judgment, and admit the landlord to defend, if the tenant has not given him notice: *Doe d. Troughton v. Roe*, 4 Burr. 1996; and see *Dobbs v. Passer*, 2 Str. 975. And after judgment signed, and execution executed, a judge at chambers may order the judgment and subsequent proceedings to be set aside on payment of costs, and a party to be let in to defend as tenant; as where the attorney, having been duly instructed inadvertently neglected to appear in time: *Doe d. Mullarky v. Roe*, 11 Ad. & E. 333; *Manby v. Whelan*, (1884) 1 W.N. 41. But, as a general rule, the court will not interfere after execution executed: *Goodtitle v. Badtittle*, 4 Taunt. 850; *Doe d. Thompson v. Roe*, 4 Dowl. 115; unless, indeed, in the case of inadvertence, as in *Doe d. Mullarky v. Roe* (*supra*), or in *Doe d. Butler v. Roe*, 2 Har. & W. 130, where, after an action for mesne profits had been commenced, the court set aside all the proceedings in the ejectment, it being shown that the landlord had never got the notices, his wife having locked them up, thinking that they related to a former action and were of no importance. In the case of collusion between the tenant and the claimant, the court will always interfere: *Goodtitle v. Badtittle* (*ante*); *Doe v. Grocers' Co. v. Roe*, 5 Taunt. 205. When the court sets aside a regular judgment, it is generally on payment of costs.

After an action of ejectment had been commenced, the right, title, and interest of the plaintiff in the land was sold to the applicant. Plaintiff in the action afterwards got judgment and issued a *ha. fa.* This was set aside on applicant's application, although he was a stranger to the action: *Roberts v. Hurley*, (1896) 12 W.N. 80. **C.L.P. Act, s. 214.**

If a judgment is signed irregularly, the judgment and execution will be set aside, and generally with costs: *Goodtitle v. Badtitle*, 9 Dowl. 1009; and the court cannot without his consent impose the terms on the defendant that he shall bring no action: *Adlam v. Noble*, 9 Dowl. 322; *Rhodes v. Hull*, 28 L.J. Ex. 265; *Moseley v. Blake*, 28 L.J. Ex. 35; if, however, he decline to consent, the court may refuse him his costs, as they are within the discretion of the court: *Cash v. Wells*, 1 B. & Ad. 375.

If the defendant by his summons applies to have the judgment set aside with costs, and the judge makes an order accordingly, but thereby restrains an action, the defendant will be bound by the terms of the order, though he do not draw it up: *Bartlett v. Stinton*, L.R. 1 C.P. 483; and even if the judge refuses costs, but notwithstanding the defendant's protest restrains an action, the defendant will be bound if he avails himself of the order: *Pearce v. Chaplin*, 9 Q.B. 802. Where the defendant is not entitled as a matter of right to have the judgment set aside, the court may impose terms: *Stockbridge v. Sussams*, 6 Jur. 487, Q.B., T.T. 1842.

Restitution.—Where a judgment under which possession has been delivered is set aside, the proper course to obtain restitution is to apply to the court in the first instance for a rule requiring possession to be restored, which will be enforced by attachment if necessary: *Corbett v. Nicholls*, 2 L.M. & P. 87. If this is ineffectual (as where the claimant has absconded) a writ of restitution may then be issued: *Doe d. Whittington v. Hards*, 20 L.J. Q.B. 406.

A motion for a writ of restitution should be made without delay: *Rocheport v. Bermingham*, 7 Ir.R.C.L. 508.

As to restitution, see R. 160 (*post*).

215. Any person appearing to defend as landlord in respect of property whereof he is in possession only by his tenant shall state in his appearance that he appears as landlord, and such person may set up any defence which a landlord appearing in an action of ejectment before the commencement of the Common Law Procedure Act of 1853 might have set up, and no other. **Appearance and defence by landlord.**
17 Vic. No. 21, s. 124.

A landlord admitted to defend under the former practice could not avail himself of any defence which the tenant was precluded from setting up: *Doe d. Willis v. Buckmore*, 9 Ad. & E. 662. Nor could he avail himself of every defence that the tenant had; thus he could not set up the want of a notice to quit to the occupier: *Doe d. Davis v. Creed*, 5 Bing. 327. The tenant will not, by a landlord being joined, be precluded from setting up any defence which he may have as tenant in possession: *Doe d. Wawn v. Horn*, 3 M. & W. 333.

Form of notice of appearance by leave, R. 275 (*post*).

216. (1) Any person appearing to such writ may limit his defence to a part only of the property claimed in the writ, describing that part with reasonable certainty in a notice intitled in the Court and action and signed by such person or his attorney, such notice to be served within four days after appearance upon the attorney whose name is endorsed on the writ if any, and if none then to be filed in the prothonotary's office. **Notice to defend for part only.**
Ibid. s. 125.

(2) An appearance without such notice confining the defence to part shall be deemed an appearance to defend for the whole.

This section does not alter the old common law rule that each of several defendants who appears in an action of ejectment is liable for the whole of the plaintiff's costs upon a general verdict for the plaintiff; a defendant can only escape this liability by confessing the plaintiff's title under ss. 246—248 (*post*): *Johnson v. Mills*, L.R. 3 C.P. 22. See as to the former practice, *Doe d. Lloyd v. Roe*, 15 M. & W. 431.

As to notice of appearance generally, see R. 35 (*post*).

Notice of appearance must be given by a person not named in the writ, who gets leave to appear: R. 275 (*post*).

C.L.P.A. 9

**C.L.P. Act,
s. 217.**

Want of certainty cured by particulars.
17 Vic. No. 21,
s. 126.

217. Want of "reasonable certainty" in the description of the property or part of it in such writ or notice shall not nullify them, but shall only be ground for an application to a Judge for better particulars of the property claimed or defended, which a Judge may order in all cases.

An application for better particulars may be made before an appearance has been entered: *Doe d. Vernon v. Roe*, 7 Ad. & E. 14; and see *Doe d. Roberts v. Roe*, 2 D. & L. 673, where an order was made for particulars under such circumstances. Although it is laid down in the books of practice that this application can only be made after an appearance has been entered, it seems but reasonable that a defendant should know what property the claimant seeks to recover, before he is called upon to state that he defends the possession of it—a possession he may not have at all; but see *Doe d. Saxton v. Turner*, 11 C.B. 896. An order for better particulars is not a stay of proceedings, unless a stay of proceedings is made part of the order: *Doe d. Roberts v. Roe (supra)*.

It is the duty of the claimant to annex to the record for trial copies of the particulars (if any) that have been furnished: s. 222 (*post*).

Defence by persons not in possession.

Ibid. s. 127:

218. The Court or a Judge may strike out or confine appearances and defences set up by persons not in possession by themselves or their tenants.

This is a power which the court always exercised, s. 214 (*ante*), over the proceedings in ejectment. See *Doe d. Lloyd v. Roe*, 15 M. & W. 431.

Judgment for default of appearance or defence.

Ibid. s. 128.

219. If no appearance is entered within the time appointed, or if an appearance is entered but the defence is limited to part only, the claimant may sign a judgment that he shall recover possession of the property or of the part thereof to which the defence does not apply.

Such judgment if for all may be in the Form No. 22 contained in the Second Schedule hereto, or to the like effect, and if for part may be in the Form No. 23 contained in the said Schedule, or to the like effect.

If an appearance is entered for a defendant, but a notice limiting the defence to part only of the premises is given under s. 216 (*ante*), then the claimant may sign a judgment for that part of the premises to which the notice does not apply.

See as to sufficiency of service of writ, *Harrington v. Bytham*, 2 C.L.R. 1033.

No formal judgment, it would appear, need be entered up. The claimant may sign judgment and issue execution on an *incipitur* under s. 133 (*ante*).

No costs are recoverable by a judgment under this section: Gray on Costs, p. 196; but they may be recovered in an action for mesne profits.

Section 69 (*ante*) does not apply in ejectment: *Scope v. Paddison*, 6 H. & N. 641; 30 L.J. Ex. 244.

Where defendant had written instructing his attorney to defend, but the letter had miscarried and judgment had been signed for want of appearance, judgment was set aside on payment of costs: *Manby v. Whelan*, (1884) 1 W.N. 41. See generally as to setting aside judgments, s. 214 and notes (*ante*).

Issue for trial.

Issue how made up.

Ibid. s. 120.

220. (1) If an appearance is entered, an issue may at once be made up without any pleadings by the claimant or his attorney, setting forth the writ, and stating the fact of the appearance with its date, and the notice limiting the defence if any of each of the persons appearing, so that it may appear for what the defence is made, and directing the sheriff to summon a jury.

(2) Such issue in case defence is made for the whole may be in the Form No. 24 contained in the Second Schedule

hereto, or to the like effect, and in case defence is made for part **C.L.P. Act,** may be in the Form No. 23 contained in the said Schedule, or to **S. 220.** the like effect.

As there are no pleadings an equitable defence cannot be set up in ejectment under s. 95 (*ante*): *Neave v. Avery*, 16 C.B. 328; 24 L.J. C.P. 207, and the defendant must, notwithstanding that provision, apply to the court in its equitable jurisdiction to enforce by injunction any equity he may have.

As to venue, see s. 109 and notes thereto.

Special case.

221. By consent of the parties and by leave of a Judge a special case may be stated according to the practice used before the commencement of the Common Law Procedure Act of 1853. Special case may be stated.
17 Vic. No. 21,
s. 130.

See special cases stated in *Doe d. Kimber v. Cafe*, 7 Exch. 675; *O'Toole v. Brown*, 3 E. & B. 572; 23 L.J.Q.B. 282.

Trial.

222. (1) The claimant may, if no special case be agreed to, proceed to trial upon the issue in the same manner as in other actions, and the particulars of the claim and defence if any, or copies thereof, shall be annexed to the record by him. Trial of issue.
Ibid. s. 131.

(2) The question at the trial shall, except in the cases hereafter mentioned, be whether the statement in the writ of the title of the claimants is true or false, and if true then which of the claimants is entitled and whether to the whole or part, and if to part then to which part of the property in question.

As to notice of trial see R. 118 *et seq.*; setting down for trial: RR. 99 *et seq.*, (*post*).

The particulars of the "claim" to be annexed to the record by the claimant seem to be the "better particulars," if any, furnished under s. 217 (*ante*).

By particulars of the "defence," again to be similarly annexed to the record, must be meant a notice limiting the defence, given under s. 216 (*ante*).

The plea of not guilty in ejectment was formerly distributable, and the defendant was entitled to a verdict as to any part of the premises sought to be recovered, to which the claimant failed to prove a title: *Doe d. Bowman v. Lewis*, 13 M. & W. 241; *Doe d. Hellyer v. King*, 6 Exch. 791; 2 L.M. & P. 493; and see *Alcock v. Wilshaw*, 2 E. & E. 633; 29 L.J.Q.B. 143.

Tenants in common may recover under a joint writ the property to which they are entitled as tenants common: *Elliss v. Elliss*, E.B. & E. 81; 27 L.J.Q.B. 316; they could not formerly have recovered on a joint demise in ejectment: *Doe d. Poole v. Errington*, 1 Ad. & E. 750.

Where some of many tenants in common are plaintiffs in ejectment, they can only recover, even as against a stranger, to the extent of their undivided interests; and it rests upon them to define the extent of such interests, and in the absence of such definition they will be nonsuited: *Doe d. Hellyer v. King*, 6 Exch. 791.

Formerly each demise raised a distinct issue: *Doe d. Smith v. Webber*, 2 Ad. & E. 448. Now, instead of several demises, there will be several plaintiffs: s. 210 (*ante*). If some of the plaintiffs only be found entitled, the principle of *Doe d. Smith v. Webber* (*supra*), would still seem to be applicable, so as to entitle the defendant to costs as on issues found for him.

Evidence.—Where a Crown grant of land described in a manner coinciding with the description in the writ was put in evidence, this was held to be *prima facie* evidence of claimant's title: *Newton v. Iles*, (1867) 7 S.C.R. 276.

The land claimed and the land defended for must be taken to be the same; but there must be some evidence to identify the land referred to in the evidence with the land claimed in the writ: *Mealy v. Shea*, (1868) 8 S.C.R. 223; *Cowdery v. Wilcox*, (1901) 18 W.N. 170.

See a special verdict, *Kosten v. Haigh*, note to s. 226.

**C.L.P. Act,
S. 222.**

Counsel for defendant admitted in court that plaintiff was entitled to recover so far as his title by deed was concerned, and was allowed the right to begin. *Held*, wrongly; *Revelt v. Braham*, 4 T.R. 407, not being followed: *Brown v. Lethbridge*, (1876) 14 S.C.R. 315.

Evidence of prior possession by the plaintiff is sufficient *prima facie* proof of his title: *Dawson v. Pyne*, (1895) 16 N.S.W.R. 116; 11 W.N. 179.

Issue except in cases hereafter mentioned.—This seems to refer to ss. 231, 232.

The sheriff on the day before defendant's estate was sequestrated, sold defendant's homestead lease to the plaintiff, who afterwards brought ejectment to recover it. *Held*, that he need not obtain the leave of the judge in Bankruptcy: *Caro v. Murphy*, (1891) 7 W.N. 92.

Verdict.
17 Vic. No. 21,
s. 131.

223. The entry of the verdict may be made in the Form No. 25 contained in the Second Schedule hereto, or to the like effect, with such modifications as may be necessary to meet the facts.

Verdict when
title appears to
have expired
before trial.
Ibid. s. 132.

224. If the title of the claimant appears to have existed as alleged in the writ, and at the time of service thereof, but it also appears to have expired before the time of trial, the claimant shall notwithstanding be entitled to a verdict according to the fact that he was so entitled at the time of bringing the action and serving the writ, and to a judgment for his costs of suit.

The "title" of the claimant here evidently means the right of the claimant to possession of the premises for which ejectment is brought as from the date of claim stated in the writ. The court would not formerly stay proceedings in an ejectment on the ground of the claimant's title having expired; for though possession could not be obtained, yet the plaintiff had a right to proceed for damages and costs: *Thrustout v. Grey*, 2 Str. 1056; see also *Doe d. Butt v. Rous*, 22 L.J.Q.B. 111. So that this section merely enacts what was the law. The Court of Exchequer in a recent case allowed a writ of possession to issue under this section, although the lease under which the plaintiff held had expired, it not being shown that the claimant had no title at all: *Gibbins v. Buckland*, 1 H. & C. 736; 32 L.J. Ex. 156. See, however, the observations of *Westbury, L.C.*, on this case in *Buckland v. Gibbins*, 32 L.J. Ch. 391.

Non-appearance
at trial.
Ibid. s. 134

225. (1) If the defendant appears and the claimant does not appear at the trial, the claimant shall be non-suited.

(2) If the claimant appears and the defendant does not appear, the claimant shall be entitled to recover without any proof of his title.

In case of nonsuit, defendant has his costs: R. 276 (*post*).

Special verdict
and bill of
exceptions.
Ibid. s. 135.

226. The jury may find a special verdict, or either party may tender a bill of exceptions.

Both "special verdict" in the technical sense, and "bill of exceptions" are unknown in our practice. See for the practice on them *Chitty's Archbold*, 450, 440.

Here the jury may be asked to answer certain questions or find certain facts; then, by consent, a verdict would be entered one way or the other, with leave reserved to move the court; and the court is moved for a new trial or to enter a verdict in the ordinary way.

The jury having found specially for the plaintiff for certain land described by them (and not the land described in the writ) and that the defendant knew and came prepared to defend for the land found by them as really in dispute, the court entered a verdict for the plaintiff (under the powers conferred by s. 38 of 5 Vic. No. 9, now ss. 116, 280, of this Act): *Kosten v. Haigh*, (1864) 3 S.C.R. 366.

Judgment and execution.

Judgment as in
case of non-suit.
Ibid. s. 130.

227. Judgment as in case of non-suit may be given where the Court thinks fit.

As to costs in case of nonsuit, see R. 276 (*post*).

228. Upon a finding for the claimant, judgment may be signed and execution issue for the recovery of possession of the property or such part thereof as the jury finds the claimant entitled to, and for costs, within such time as the Court or Judge before whom the cause is tried shall order, and if no such order be made then on the fifth day in term after the verdict or within fourteen days after such verdict whichever shall first happen.

C.L.P. Act, s. 228.
Judgment upon finding for claimant.
17 Vic. No. 21, s. 137.

See as to costs, where the claimant recovers part only of the premises claimed: *Alcock v. Wilshaw*, 24 Jur. 628, Q.B., H.T. 1860.

An order stating the time within which execution may issue should always be asked for, and will be made: *Commercial Banking Co. v. Alexander*, (1896) 12 W.N. 91.

Stay of execution—third party.—Plaintiff got judgment on confession against defendant, and issued *ha. fa.* Plaintiff had commenced another action against Browne to recover part of the same land. Browne now applied for stay of execution in respect of the land he was defending for. Stay granted (by consent and on terms): *McCulloch v. Brunner*, (1887) 4 W.N. 52.

After action commenced, plaintiff's right in the land was sold to applicant. Plaintiff afterwards had a verdict and issued *ha. fa.* This was set aside on motion by applicant, plaintiff's right to the land as against him being gone: *Roberts v. Hurley*, (1896) 12 W.N. 80.

229. Upon a finding for the defendants or any of them, judgment may be signed and execution issue for costs against the claimant within such time as the Court or Judge before whom the cause is tried shall order, and if no such order be made then on the fifth day in term after the verdict or within fourteen days after such verdict whichever shall first happen.

Judgment upon finding for defendant.
Ibid. s. 138.

The costs of a successful defendant will be awarded, by rule, against the real claimants, although they are not named in the writ: *Mobbs v. Vandenbrande*, 4 B. & S. 904; 33 L.J.Q.B. 177.

It is equally advisable, as under the previous section, to ask for an order fixing the time within which execution may issue, otherwise the time specified in the section might elapse without execution: see *Com. Banking Co. v. Alexander*, 12 W.N. 91.

230. Upon any judgment in ejectment for recovery of possession and costs, there may be either one writ or separate writs of execution for the recovery of possession and for the costs at the election of the claimant.

Execution for recovery of possession and costs may be joint or separate.
Ibid. s. 139.

The claimant may either issue a writ of *habere facias possessionem*, and a separate writ of *fi. fa.* for the costs, or he may sue out, as formerly, a writ of *habere*, with the addition to it of a *fi. fa.*

The writ of *habere*, like the writ of *fi. fa.*, is returnable immediately after the execution thereof: *Doe d. Hudson v. Roe*, 18 Q.B. 806; 21 L.J.Q.B. 359.

As to the sheriff's fees on executing a writ of possession, see s. 135 (*ante*).

Defences by joint tenants, &c.

231. (1) If such an action is brought by some or one of several persons entitled as joint tenants, tenants in common, or coparceners, any other joint tenant, tenant in common, or coparcener in possession may at the time of appearance or within four days thereafter—

Defence by joint tenants, tenants in common, or coparceners.
Ibid. s. 140.

- (a) give notice in the same form as in the notice of a limited defence that he defends as such, and admits the right of the claimant to an undivided share of the property (stating what share), but denies any actual ouster of him from the property; and

**C.L.P. Act,
S. 231.**

- (b) file an affidavit stating with reasonable certainty that he is such joint tenant, tenant in common, or coparcener, and the share of such property to which he is entitled, and that he has not ousted the claimant.

(2) Such notice shall be entered in the issue in the same manner as the notice limiting the defence, and upon the trial of such an issue the additional question of whether an actual ouster has taken place shall be tried.

If a tenant in possession claims the whole, and denies possession to the other, this is evidence of an ouster: *Doe d. Hellings v. Bird*, 11 East, 49. So where three out of four co-tenants authorised a railway company to use the land, such user was held to amount to an ouster: *Doe d. Wawn v. Horn*, 5 M. & W. 564.

Before the Stat. 3 & 4 Will. 4, c. 27 (adopted by 8 Will. IV, No. 3), a bare perception of the profits by one tenant in common for twenty-six years was no ouster: *Fairclaim v. Shackleton*, 5 Burr. 2604; the possession of one joint tenant, coparcener, &c., being at common law the possession of all. By s. 12 of that statute it is enacted: that the possession of land or receipt of rent in entirety by one of several coparceners, joint-tenants, or tenants in common, is not to be deemed the possession or receipt of the others.

It has been decided, in Ireland, that this section does not dispense with proof of actual ouster: *O'Sullivan v. M'Swiny*, 1 Longf. & T. 111.

Trial and judgment in such case.

17 Vic. No. 21, s. 141.

232. (1) Upon the trial of such issue as last aforesaid, if it is found that the defendant is joint tenant, tenant in common, or coparcener with the claimant, then the question whether an actual ouster has taken place shall be tried, and unless such actual ouster is proved the defendant shall be entitled to judgment and costs.

(2) If it is found either that the defendant is not such joint tenant, tenant in common, or coparcener, or that an actual ouster has taken place, then the claimant shall be entitled to judgment for the recovery of possession and costs.

Death of parties.

Action not to abate by death. *Ibid.* s. 142.

233. The death of a claimant or defendant shall not cause the action to abate, but it may continue as hereinafter mentioned.

In *Denison v. Holliday*, 1 H. & N. 61, where a special case was set down for argument after verdict, and the claimant then died, the Court of Exchequer directed a suggestion of the claimant's death to be entered before argument; it would appear, however, that this direction was erroneous, and it was not carried out: see *S.C.*, 1 H. & N. 650, n.; and when the case was called on, *Pollock*, C.B., said the proper course was to proceed with the argument, and after the court had decided whether the verdict should stand or not, to enter up judgment *nunc pro tunc*, and this course was accordingly followed: *S.C.*, 26 L.J. Ex. 228; from this last report it appears that a rule was drawn up that the heir should be liable for costs in case judgment should be given against him.

Death before trial where right survives. *Ibid.* s. 143:

234. (1) In case the right of the deceased claimant survives to another claimant, a suggestion may be made of the death, which suggestion shall not be traversable but shall only be subject to be set aside if untrue, and the action may proceed at the suit of the surviving claimant.

(2) If such suggestion is made before the trial, then the claimant shall have a verdict and recover such judgment as aforesaid upon its appearing that he was entitled to bring the action either separately or jointly with the deceased claimant.

235. In case of the death before trial of one of several claimants whose right does not survive to another or others of the claimants, where the legal representative of the deceased claimant does not become a party to the suit in the manner hereinafter mentioned, a suggestion may be made of the death, which suggestion shall not be traversable but shall only be subject to be set aside if untrue, and the action may proceed at the suit of the surviving claimant for such share of the property as he is entitled to and costs.

**C.L.P. Act,
S. 235.**

Death before trial where right does not survive.

17 Vic. No. 21, s. 144.

Hereinafter mentioned : see s. 237 (post).

236. (1) In case of a verdict for two or more claimants, if one of such claimants die before execution executed, the other claimant may, whether the legal right to the property survives or not, suggest the death in manner aforesaid and proceed to judgment and execution for recovery of possession of the entirety of the property and the costs.

Death of one of several claimants having obtained a verdict.

Ibid. s. 145;

(2) Nothing herein contained shall affect the right of the legal representative of the deceased claimant, or the liability of the surviving claimant to such legal representative, and the entry and possession of such surviving claimant under such execution shall be considered as an entry and possession on behalf of such legal representative in respect of the share of the property to which he is entitled as such representative, and the Court may direct possession to be delivered accordingly.

237. (1) In case of the death of a sole claimant, or before trial of one of several claimants whose right does not survive to another or others of the claimants, the legal representative of such claimant may by leave of the Court or a Judge enter a suggestion of the death and that he is such legal representative and the action shall thereupon proceed.

Death of claimant where right does not survive.

Ibid. s. 140.

(2) If such suggestion is made before the trial, the truth of the suggestion shall be tried thereat together with the title of the deceased claimant, and such judgment shall follow upon the verdict in favour of or against the person making such suggestion as hereinbefore provided with reference to a judgment for or against such claimant.

(3) If such suggestion in the case of a sole claimant is made after trial and before execution executed by delivery of possession thereupon, and such suggestion is denied by the defendant within eight days after notice thereof or such further time as the Court or a Judge may allow, then such suggestion shall be tried; and if upon the trial thereof a verdict passes for the person making such suggestion, he shall be entitled to such judgment as aforesaid for the recovery of possession and for the costs of and occasioned by such suggestion; and in case of a verdict for the defendant, such defendant shall be entitled to such judgment as aforesaid for costs.

Where claimant dies after verdict and before the argument of a special case, see *Denison v. Holliday*, 1 H. & N. 61, 650, n.; 26 L.J. Ex. 227, cited (*ante*) note to s. 233.

238. In case of the death before or after judgment of one of several defendants who defend jointly, a suggestion may be made of the death, which suggestion shall not be traversable

Death of one of several joint defendants.

Ibid. s. 147.

C.L.P. Act, but only be subject to be set aside if untrue, and the action may proceed against the surviving defendant to judgment and execution.

S. 238.

The case of defendants who defend separately is provided for by s. 242 (*post*).

Death of all the
defendants before
trial.
17 Vic. No. 21,
s. 148.

239. (1) In case of the death of a sole defendant or of all the defendants before trial, a suggestion may be made of the death, which suggestion shall not be traversable but only be subject to be set aside if untrue, and the claimant shall be entitled to judgment for recovery of possession of the property, unless some other person appears and defends within the time to be appointed for that purpose by the order of the Court or a Judge made upon the application of the claimant.

(2) The Court or a Judge, upon such suggestion being made and upon such application as aforesaid may order that the claimant shall be at liberty to sign judgment within such time as the Court or Judge thinks fit, unless the person then in possession by himself or his tenant or the legal representative of the deceased defendant shall within such time appear and defend the action.

(3) Such order may be served in the same manner as the writ, and if such person appears and defends the same proceedings may be taken against such new defendant as if he had originally appeared and defended the action, and if no appearance be entered and defence made, then the claimant may sign judgment pursuant to such order.

Death of all the
defendants after
verdict.
Ibid. s. 149.

240. In case of the death of a sole defendant or of all the defendants after verdict, the claimant shall nevertheless be entitled to judgment as if no such death had taken place, and to proceed by execution for recovery of possession without suggestion or revivor, and to proceed for the recovery of the costs in like manner as upon any other judgment for money against the legal representatives of the deceased defendant or defendants.

Death before
trial of de-
fendant who
defends
separately for
part.
Ibid. s. 150.

241. In case of the death before trial of one of several defendants who defends separately for a portion of the property for which the other defendant or defendants do not defend, the same proceedings may be taken as to such portion as in the case of the death of a sole defendant, or the claimant may proceed against the surviving defendants in respect of the portion of the property for which they defend.

- The proceedings under s. 239 (*supra*) may be taken with reference to that part of the premises for which the defendant, who has died, defended.

Death of de-
fendant defend-
ing separately
for property in
respect of
which others
also defend.
Ibid. s. 151.

242. (1) In case of the death before trial of one of several defendants who defends separately in respect of property for which surviving defendants also defend, the Court or a Judge may at any time before the trial allow the person in possession of the property at the time of the death or the legal representative of the deceased defendant, to appear and defend on such terms as appear reasonable and just upon the application of such person or representative.

(2) If no such application be made or leave granted, **C.L.P. Act, S. 242.** the claimant suggesting the death in manner aforesaid may proceed against the surviving defendant or defendants to judgment and execution.

The case of defendants who defend jointly is provided for by s. 238 (*supra*).

Discontinuance.

243. The claimant may at any time discontinue the action as to one or more of the defendants, by giving to the defendant or his attorney a notice intituled in the Court and action and signed by the claimant or his attorney stating that he discontinues such action; and thereupon the defendant to whom such notice is given may forthwith sign judgment for costs in the Form No. 26 contained in the Second Schedule hereto, or to the like effect.

Claimant may discontinue by notice.
17 Vic. No. 21, s. 152.

The leave of the court is necessary in the case of one of several claimants; see next section.

244. If one of several claimants desires to discontinue he may apply to the Court or a Judge to have his name struck out of the proceedings, and an order may be made thereupon upon such terms as to the Court or Judge may seem fit, and the action shall thereupon proceed at the suit of the other claimants.

Discontinuance by one of several claimants.
Ibid. s. 153.

Default in proceeding to trial.

245. If after appearance entered the claimant without going to trial suffers the time allowed for going to trial by the practice of the Court in ordinary cases after issue joined to elapse, the defendant may give twenty days' notice to the claimant to proceed to trial at the sittings or assizes next after the expiration of the notice; and if the claimant afterwards neglects to give notice of trial for such sittings or assizes or to proceed to trial in pursuance of the said notice given by the defendant, and the time for going to trial is not extended by the Court or a Judge, the defendant may sign judgment in the Form No. 27 contained in the Second Schedule hereto, and recover the costs of defence.

Judgment for not proceeding to trial after notice.
Ibid. s. 154.

The procedure under s. 111 (*ante*) and under this section is similar.

• It has been held that the defendant by giving a notice to proceed under this section does not waive his right to have the action stayed until the costs of a former action have been paid: *Tichborne v. Mostyn*, 26 L.T., N.S. 554; E.T. 1872, C.P.

As to the time for proceeding to trial see RR. 99, *et seq.*; see s. 111 and notes; but R. 124 (*post*) altering the time of notice does not apply to notice under this section.

Judgment on Confession.

246. The defendant may confess the action as to the whole or part of the property by giving the claimant a notice intituled in the Court and action and signed by the defendant, such signature to be attested by his attorney; and thereupon the claimant may forthwith sign judgment and issue execution for the recovery of possession and costs in the Form No. 28 contained in the Second Schedule hereto, or to the like effect.

Defendant may confess the action.
Ibid. s. 155.

This section provides for the case of a confession (*semble*), after appearance to the writ; for judgment by default may be signed on non-appearance, s. 219; and where the real defendant appeared, and consented that the plaintiff should sign

C.L.P. Act, s. 246. judgment, it was held that the plaintiff was entitled to his costs, although the case is not specifically provided for by the Act: *Dalbiac v. Delacourt*, L.R. 10 Ex. 210; 44 L.J. Ex. 129.

A judgment signed on a confession given by a tenant in possession, by collusion with the claimant, will be set aside at the instance of the landlord, so that he may be admitted to defend: *Doe d. Locke v. Franklin*, 7 Taunt. 9; *Doe d. Draper v. Dyer*, 3 Dowl. 696.

Confession by one of several defendants defending separately for part.
17 Vic. No. 21 s. 156.

247. If one of several defendants who defends separately for a portion of the property for which the other defendants do not defend desires to confess the claimant's title to such portion, he may give a like notice to the claimant; and thereupon the claimant may forthwith sign judgment and issue execution for the recovery of possession of such portion of the property, and for the costs occasioned by the defence relating to the same, and the action may proceed as to the residue.

Confession by one of several defendants who defend for same property
Ibid. s. 157.

248. If one of several defendants who defends separately in respect of property for which other defendants also defend desires to confess the claimant's title, he may give a like notice thereof; and thereupon the claimant may sign judgment against such defendant for the costs occasioned by his defence, and may proceed in the action against the other defendants to judgment and execution.

General provisions.

Effect of judgment.
Ibid. s. 159.

249. The effect of a judgment in an action of ejectment under this Act shall be the same as that of a judgment in the action of ejectment before the commencement of the Common Law Procedure Act of 1853.

The effect of a judgment in ejectment is fully stated in *Aslin v. Parker*, 2 Burr. 665. It is conclusive evidence of the title of the claimant to all the mesne profits accruing subsequently to the date of the claim alleged in the writ, which must be laid subsequent to the time when the right of entry accrued. See *Doe v. Wellsman*, 2 Exch. 368; and the judgment of *Parke, B.*, in *Turner v. Coalbrook Steam Co.*, 5 Exch. 932; see also *Wilkinson v. Kirby*, 15 C.B. 430; and *Barnett v. Guildford*, *Earl of*, 24 L.J. Ex. 81.

The claimant in a second ejectment for the same premises against the same defendant may be ordered to give security for costs: s. 251 (*infra*).

As to entering judgment, see s. 133 (*ante*).

Jurisdiction of Courts and Judges.
Ibid. s. 171:

250. (1) The Court and Judges respectively shall and may exercise over the proceedings the like jurisdiction as was exercised in the action of ejectment before the commencement of the said Act so as to ensure a trial of the title and of actual ouster when necessary only, and for all other purposes for which such jurisdiction might have been exercised before the commencement of the said Act.

(2) The provisions of all laws and statutes not inconsistent with the provisions of this Act, which were in force at the time of the commencement of the said Act and have not since been repealed, and which may be applicable to the altered mode of proceeding, shall remain in force and be applied thereto.

The real defendant, though not a party to the record, may be ordered by rule to pay the costs of a successful claimant: *Hutchinson v. Greenwood*, 4 E. & B. 324; 24 L.J.Q.B. 2; *Waldron v. Mitchell*, (1892) 13 N.S.W.R. 153; 8 W.N. 117; *Thornton*

v. *Wilkinson*, 11 W.R. 916; Ex. E.T. 1863. So the real claimant may in like manner be ordered to pay the costs of a successful defendant: *Mobbs v. Vandenberg*, 4 B. & S. 904; 33 L.J.Q.B. 177.

**C.L.P. Act,
S. 250.**

See next section as to staying proceedings in a second action till costs of a former action have been paid.

Security for costs.

251. If any person brings an action of ejectment after a prior action of ejectment for the same premises has been unsuccessfully brought by such person, or by any person through or under whom he claims, against the same defendant or against any person through or under whom he defends, the Court or a Judge may, on the application of the defendant at any time after such defendant has appeared to the writ, order that the plaintiff shall give to the defendant security for the payment of the defendant's costs, and that all further proceedings in the cause shall be stayed until such security be given, whether the prior action has been disposed of by discontinuance, or by non-suit, or by judgment for the defendant.

Claimant in second ejectment for same premises against same defendant may be ordered to give security for costs.

20 Vic. No. 31
s. 57.

As to the effect of a judgment in ejectment, see s. 249 (*supra*).

By the preceding section, 250, the court and judges are authorised to exercise the jurisdiction exercised in actions of ejectment prior to the C.L.P. Act, 1853.

Costs of former trial.—Prior to that Act and prior to the corresponding English Act, the courts invariably stayed proceedings in a second action of ejectment, brought in substance to try the same title which had been decided in the first action, until the costs of the former ejectment had been paid: *Keene d. Angel v. Angel*, 6 T.R. 740; *Doe d. Langdon v. Langdon*, 5 B. & Ad. 864. Nor was it necessary to bring the case within the rule that the ejectment shall be between the same parties: *Doe d. Hamilton v. Hatherley*, 2 Str. 1152; *Keene d. Angel v. Angel* (*supra*). Thus, where the son and heir of the claimant in a former ejectment brought an action for the recovery of different premises against the same defendant, and claimed under the same title, proceedings were stayed; and this although the claimant in the first action was discharged as an insolvent, while in custody under attachment for non-payment of such costs: *Doe d. Heighley v. Harland*, 10 Ad. & E. 761. So proceedings in the first action were stayed, where it appeared that the second action would turn upon the same question of title which was decided in the first action, though different premises were claimed and a different person made defendant: *Doe d. Brayne v. Bather*, 12 Q.B. 941; *Tichborne v. Mostyn*, 26 L.T., N.S. 554, E.T. 1872. So again, where the action, though in form different, was substantially the same: *Cobbett v. Warner*, L.R. 2, Q.B. 108. But the court would not stay proceedings until the taxed costs of a suit in equity, brought by the same party for the same premises, had been paid: *Doe d. Williams v. Winch*, 3 B. & A. 602. It has been held that giving a notice to proceed (under the section corresponding to s. 245) in the second action is no waiver of the right to an order to stay proceedings therein: *Tichborne v. Mostyn*, 26 L.T., N.S. 554.

The court would not compel the claimant to give security for the costs of the second ejectment: *Doe d. Selby v. Alston*, 1 T.R. 491; as may now be done under this section.

The section applies to all cases where a prior action of ejectment has been "unsuccessfully brought," and is not limited to those cases in which the prior action has been "disposed of by discontinuance, or by nonsuit, or by judgment for the defendant" *Skene v. Davies*, 7 B. & S. 463. In this case the first action of ejectment had by consent been discontinued and a chancery suit brought instead thereof, in which suit the bill was subsequently dismissed.

Stay of proceedings in other cases than ejectment.—"Generally speaking, the court has no power to stay proceedings in an action unless it is vexatiously brought. But where, after a first action has been determined, a second was brought for the same cause, the court might interfere if it was shown that the second action was vexatious": *Contest v. Croxon*, (1874) reported 12 W.N. 128, and followed in *Timoney v. Scott*, (1896) 12 W.N. 127, where proceedings in a second action were stayed till costs of a first action, in which judgment of *non pros.* had been signed, were paid.

In *Murphy v. Horan*, (1885) 2 W.N. 6, plaintiff had brought an action against defendant in the District Court and there was verdict for defendant. Subsequently he brought other actions in the District Court arising out of the same matter, which

**C.L.P. Act,
S. 251.**

were stayed by the District Court Judge until the costs in the first action were paid. Then plaintiff brought an action arising out of the same matter in the Supreme Court. *Windeyer, J.*, ordered a stay of proceedings until the costs in the whole of the District Court proceedings had been paid, and the court on appeal refused to disturb the order.

So after nonsuit in the District Court : *Ringdahl v. Bronner*, (1890) 7 W.N. 55.

To commence an action here while an action for the same cause is pending in England, is not necessarily vexatious : *Hollander v. McQuade*, (1896) 12 W.N. 154.

Proceedings in an action were stayed until costs of a suit in Equity, brought on the same cause of action which had been dismissed with costs, were paid : *Lucas v. Neeld*, (1896) 13 W.N. 88 ; but on appeal on the point that the summons was only to strike out the declaration, the court varied the order and struck out the declaration : *ibid.* 144.

Query : Whether it is necessary to show that the second action is vexatious : *Rheuben v. Ryan*, (1894) 10 W.N. 196 ; see *Dorn v. Dorn*, (1888) 5 W.N. 1 ; *Chitty's Archbold*, 1381.

Where the costs of an action, brought by an infant by one next friend, have not been paid, the court cannot stay another action for the same cause by the infant by another next friend : *King v. Kauri Timber Co.*, (1902) 19 W.N. 280.

Stephen, J., refused to stay proceedings on a new trial, unless costs of the new trial motion, ordered to be paid by the plaintiff, had been paid : *Wood v. McMahon*, (1891) 8 W.N. 12.

It has been thought useful to print here the Landlord and Tenant Act, 1899 (No. 18), ss. 7—15, and the Conveyancing and Law of Property Act, 1898 (No. 17) ss. 106, 107, dealing with ejectment between landlord and tenant, and between mortgagee and mortgagor. See also the Forfeiture of Leases Act (*post*).

Landlord and Tenant Act of 1899, No. 18.

Tenants to give notice of ejectment to landlord.
17 Vic. No. 21, s. 160.

S. 7. Every tenant to whom any writ in ejectment is delivered or to whose knowledge it comes shall forthwith give notice thereof to his landlord or his bailiff or receiver under penalty of forfeiting the value of three years improved or rack rent of the premises demised or held in the possession of such tenant to the person of whom he holds to be recovered by action in the Supreme Court.

The court will, in some instances, set aside regular judgments at the instance of a landlord, on the ground that he has not received notice of the proceeding : s. 214 (*ante*).

The improved or rack rent here mentioned is not the rent reserved, but such a rent as might be fairly agreed on at the time of the service of the writ, in case the premises were then to be let : *Croker v. Fothergill*, 2 B. & A. 652.

This section extends to those cases only where ejectments are brought which are inconsistent with the landlord's title ; and therefore a tenant to a mortgagor, who did not give him notice of an ejectment brought by the mortgagee to enforce an attornment, was held not to be liable to the penalties there mentioned ; the Act expressly permitting an ejectment to be brought for such a purpose : *Buckley v. Buckley*, 1 T.R. 647.

A mortgagee cannot, by merely giving the lessee notice, entitle himself to dis-train for rent ; an attornment is necessary to create between them the relation of landlord and tenant : *Evans v. Elliott*, 9 Ad. & E. 342.

Proceedings in ejectment by landlord for non-payment of rent.
Ibid. s. 161.

S. 8. (1) In all cases between landlord and tenant whenever one half year's rent is in arrear and the landlord or lessor to whom the same is due is entitled to re-enter for the non-payment thereof, such landlord or lessor may, without any formal demand or re-entry, serve a writ in ejectment for the recovery of the demised premises, or if the same cannot be legally served or no tenant be in actual possession of the premises, may affix a copy thereof upon the door of any demised messuage, or if such action in ejectment is not for the recovery of any messuage, then upon some notorious place of the land comprised in such writ in ejectment, and such affixing shall be deemed legal service thereof, which service or affixing such writ in ejectment shall stand in the place and instead of a demand and re-entry.

(2) If judgment is recovered against the defendant for non-appearance, and it is proved to the court by affidavit (or if the defendant appears and it is proved at the trial) that half a year's rent was due before the said writ was served and that no sufficient distress was to be found on the demised premises countervailing the arrears

then due, and that the lessor had power to re-enter, the lessor shall recover judgment and execution in the same manner as if the rent in arrear had been legally demanded and a re-entry made.

**C.L.P. Act,
S. 261.**

(3) If the lessee or his assignee or other person claiming or deriving under the said lease, suffers judgment to be had and recovered on such trial in ejectment and execution to be executed thereon, without paying the rent and arrears together with full costs, and without proceeding for relief in equity within six months after such execution executed, such lessee, assignee and all other persons claiming and deriving under the said lease shall be barred and foreclosed from all relief or remedy in law or equity, and the said landlord or lessor shall from thenceforth hold the said demised premises discharged from such lease.

If on such ejectment a verdict passes for the defendant, or the claimant is non-suited therein, such defendant shall recover his costs.

Nothing herein contained shall extend to bar the right of any mortgagee of such lease, or any part thereof, who is in possession, provided that within six months after such judgment obtained and execution executed, he pays all rent in arrear and all costs and damages sustained by such landlord or lessor, and performs all the covenants and agreements which on the part and behalf of the first lessee are and ought to be performed.

This section is a re-enactment of 4 Geo. 2, c. 28, s. 2, the cases decided upon which are collected in 1 Wms. Saund. 287 a, *et seq.* (16).

The provisions of this section apply to those cases only where the right to enter is absolute (not *quousque*), and where the lease upon such re-entry is forfeited: *Doe d. Darke v. Bowditch*, 8 Q.B. 973.

The right of re-entry for nonpayment of rent (under the statute) is not necessarily waived by taking, before the time limited for payment to save the forfeiture, an insufficient distress for the rent, even though the lessor continue in possession under the distress after the time so limited: *Doe d. Taylor v. Johnson*, 1 Stark. 411; nor is it waived by taking an insufficient distress after that time for arrears of rent which accrued due before the forfeiture: *Brewer d. Lord Onslow v. Eaton*, 3 Doug. 230, cited 6 T.R. 220; because as the statute requires the landlord to prove that no sufficient distress was to be found on the premises he only distrained to complete the title given him by the statute: *per Lord Mansfield, C.J., S.C.* But where three quarters' rent were due and the landlord distrained for the whole arrears before the day limited for payment of the last quarter; it was held that the forfeiture was waived though it would have been otherwise had the distress been confined to the recovery of the two previous quarters' rent: *Cotesworth v. Spokes*, 10 C.B., N.S. 103; 30 L.J. C.P. 220; but a right of entry for forfeiture may be waived by bringing an action for rent accrued due subsequent to the forfeiture: *Dendy v. Nicholl*, 4 C.B., N.S. 376; and so also, it seems, by an unqualified demand for such rent: *S.C.*; *Doe d. Nash v. Birch*, 1 M. & W. 408, *per Parke, B.*

It would seem that it must appear that the landlord had a power to re-enter in respect of the non-payment of half a year's rent remaining actually due: *Cotesworth v. Spokes*, 10 C.B., N.S. 103, 112; 30 L.J.C.P. 220, 222, at the time of issuing the writ: *Doe d. Dixon v. Roe*, 7 C.B. 134; *Thomas v. Lulham*, (1895) 2 Q.B. 400; *Schell v. Whittaker*, (1895) 13 W.N. 169.

No demand of rent is necessary, as at common law, even if the proviso for re-entry is expressed to be in case of the rent in arrear being lawfully demanded: *Doe d. Scholefield v. Alexander*, 2 M. & S. 525. It may be otherwise if there is an express covenant not to enter without demand: *Doe d. Shrewsbury, Earl of v. Wilson*, 5 B. & A. 385, *per Abbott, C.J.*, and where the condition was, that on payment of half a year's rent the landlord might re-enter for the same till it were fully satisfied, it was held that he could not proceed under the 4 Geo. 2, c. 28: *Doe d. Darke v. Bowditch*, 8 Q.B. 973.

The date of the writ and the date of the claim therein must be both subsequent to the last day when the rent ought to have been paid: see *Doe d. Lawrence v. Shawcross*, 3 B. & C. 754.

Where a landlord or lessor proceeds for the recovery of a dwelling-house and other premises demised by one lease, if the dwelling-house is unoccupied, and the rest of the premises is in the occupation of a tenant, service of the writ of ejectment may be effected by personally serving the tenant with a copy, and affixing another on the front door of the house: *Clinton, Lord v. Wales*, 2 Jur., N.S. 1096.

The action can only be sustained in case there is no sufficient distress on the premises, and the insufficiency of the distress must be clearly established: *Doe d. Foster v. Wandlass*, 7 T.R. 117; every part of the premises must be searched: *Rees*

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v. *King*, 2 B. & B. 514; see also *Price v. Worwood*, 4 H. & N. 512. If a broker going to distrain, by using reasonable diligence would not find sufficient to distrain, this will constitute an insufficiency within the section: *Doe d. Haverson v. Franks*, 2 C. & K. 678. So if the tenant by locking up the premises, prevents the goods from being found, that is, "got at," to distrain: *Doe v. Dyson*, M. & M. 77; *Doe v. Cox*, 5 D. & L. 272; *Romily v. Fycroft*, 4 W.R. 26. Proof that no sufficient distress was found on the premises on any one day after the limited for payment of the rent, to save the forfeiture is *prima facie* evidence, and is sufficient to bring the case within the statute unless the defendant shows that there was sufficient distress: *Doe v. Fuchau*, 15 East, 286.

As to goods privileged from distress see Landlord and Tenant Act, 1899, s. 39.

It would seem that the goods of a person who is in charge of part of the property on behalf of the plaintiff, need not be taken into account as distrainable in proceedings under this section: *Wheeler v. Stevenson*, 6 H. & N. 155; 30 L.J. Ex. 46.

As to sufficiency of distress in the case of growing crops seized, see *Ex parte Arnison*, L.R. 3 Ex. 56.

This section prescribes the mode of proceeding in two cases, viz.: 1st, in the case of judgment against the defendant for non-appearance; 2ndly, in the case of the action coming on for trial when the defendant has appeared.

1. In the case of judgment by default, an affidavit must be made that half a year's rent was due at the time when (*Cotesworth v. Spokes*, 10 C.B., N.S. 103) the writ was served (*quære* sued out, *vide infra*); that no sufficient distress was to be found upon the premises countervailing the arrears then due; and that the lessor (claimant) had power to re-enter.

Great precision was formerly required in the affidavit as to *half a year's rent* (and not more) being due; upon the ground that a landlord has no right to lie by for a length of time (for instance a whole year), and then seek thus to render the provisions of the section available: *Doe d. Powell v. Rowe*, 9 Dowl. 548, *per Coleridge, J.*; but see *Doe d. Gretton v. Roe*, 4 C.B. 576; and *Cross v. Jordan*, 8 Exch. 149.

Where judgment has been obtained upon an affidavit, which the claimant is apprehensive may be held to be defective, the court will allow the judgment to be superseded, and another judgment to be signed, on an amended affidavit: *Doe d. Gretton v. Roe* (*supra*).

The motion for judgment where the defendant did not appear, was absolute in the first instance: *Cross v. Jordan* (*ante*); and *Youens v. Keen*, 2 C.B., N.S. 384.

If there is a sufficient distress on the premises, the statute does not apply; and the lessor must proceed at common law, as before the statute: *Doe d. Forster v. Wandlass*, 17 T.R. 117; and subject himself to all the risks and inconveniences of so proceeding: *Adams, Eject.* 121; and 1 Wms. Saund. 287 *et seq.* (16); unless the terms of the lease provide against the lessee's right to a legal demand of the rent: *Doe d. Harris v. Masters*, 2 B. & C. 490.

2. In the case of the action coming on for trial, the claimant, in order to recover, must prove that which he must, in the case of judgment by default, state in the affidavit: *Doe d. Hitchings v. Lewis*, 1 Burr. 620. He must, in order to take advantage of the foreclosure given by the section, give this proof, even if the defendant do not appear at the trial. The claimant may, however, in this, as in all other cases of ejectment, where the defendant does not appear at the trial, obtain a mere verdict without giving any evidence at all: s. 225 (*ante*).

Lessee proceeding in equity not to have injunction or relief without payment of rent and costs.

17 Vic. No. 21, s. 162.

S. 9. (1) In case the said lessee, his assignee, or other person claiming any right title or interest in law or equity of, in, or to the said lease within the time aforesaid proceeds for relief in Equity, such person shall not have or continue any injunction against the proceedings at law on such ejectment unless within forty days next after the claimant in such ejectment has filed his defence such person brings into court and lodges with the Master in Equity such sum of money as the lessor or landlord in his defence swears to be due and in arrear over and above all just allowances, and also the costs taxed in the said action, there to remain till the hearing of the cause or to be paid out to the lessor or landlord on good security, subject to the decree of the court.

(2) If such proceedings in Equity are taken within the time aforesaid, and after execution is executed, the lessor or landlord shall be accountable only for so much as he shall really and *bona fide*, without fraud, deceit, or wilful neglect, make of the demised premises from the time of his entering into the actual possession thereof, and if what is so made by the lessor or landlord be less than the rent reserved on the

said lease, then the said lessee or his assignee, before he is restored to his possession shall pay such lessor or landlord the difference between the money so made by him and the reserved rent for the time such lessor or landlord held the said lands. **C.L.P. Act, S. 251.**

See as to relief formerly afforded by the Court of Chancery: *Peachy v. Somerset, Duke of*, and notes thereto in *Tudors Leading Cases in Equity*.

S. 10. (1) If the tenant or his assignee at any time before the trial in such ejectment pays or tenders to the lessor or landlord, his executors, or administrators, or his or their attorney in that cause, or pays into court all the rent and arrears, together with the costs, all further proceedings of the said ejectment shall cease and be discontinued. Tenant paying all rent with costs proceedings to cease. 17 Vic. No. 21, s. 163.

(2) If such lessee, his executors, administrators, or assigns, upon such proceedings as aforesaid, is relieved in equity, he and they shall have, hold and enjoy the demised lands according to the lease thereof made without any new lease.

A sub-lessee is an assignee within this section, and may apply for a stay of proceedings: *Doe d. Wyatt v. Byron*, 1 C.B. 623; so may a mortgagee: *Doe d. Whitfield v. Roe*, 3 Taunt. 402.

The application to stay proceedings must, under this section, have been made before trial: *Doe d. West v. Davis*, 7 East, 363. Relief will be granted where the tender of rent has been made before the action is actually commenced: *Goodright v. Noright*, 2 W. Bl. 746.

Upon making application under this section, the rent should be calculated to the last rent day, and not to the day of computing: *Doe d. Harcourt v. Roe*, 4 Taunt, 883.

The court had no power to stay proceedings in an ejectment brought for a forfeiture for breaches other than for non-payment of rent: *Doe d. Mayhew v. Asby*, 10 Ad. & E. 71.

The payment of money into court under this section does not operate as a waiver of other forfeitures: *Toleman v. Portbury*, L.R. 6 Q.B. 245; affirmed in Ex. Ch., L.R. 7 Q.B. 344; and *semble*, if the plaintiff succeed in another forfeiture inconsistent with the claim for rent, the defendant is entitled to a return of the rent: *S.C.*, L.R. 6 Q.B. 249.

Though the Statute only applies where six month's rent is due, the court can stay proceedings in a case where less rent is due, on the lessee paying such rent: *Schell v. Whitaker*, (1897) 13 W.N. 169.

The Lessee may get relief in Equity, under the section where re-entry has been made without process of law: *Howard v. Fanshawe*, (1895) 2 Ch. 581.

S. 11. (1) Where the term or interest of any tenant holding under a lease or agreement in writing any lands for any term or number of years, certain, or from year to year, has expired or been determined either by the landlord or tenant by regular notice to quit, and such tenant, or any one holding or claiming by or under him refuses to deliver up possession accordingly after lawful demand in writing made and signed by the landlord or his agent, and served personally upon or left at the dwelling house or usual place of abode of such tenant or person, and the landlord thereupon proceeds by action of ejectment for the recovery of possession, he may at the foot of the writ in ejectment, address a notice to such tenant or person requiring him to find such bail if ordered by the court or a judge, and for such purposes as are hereinafter next specified. Ejectment by landlord against tenant holding over after expiration of term or determination of tenancy by notice to quit. *Ibid.* s. 164.

(2) Upon the appearance of the party, on an affidavit of service of the writ and notice, the landlord producing the lease or agreement or some counterpart or duplicate thereof, and proving the execution of the same by affidavit, and upon affidavit that the premises have been actually enjoyed under such lease or agreement, and that the interest of the tenant has expired or been determined by regular notice to quit, as the case may be, and that possession has been lawfully demanded in manner aforesaid, may apply to the court or a judge for a rule or summons for such tenant or person to show cause within a time to be fixed by the court or judge on a consideration of the situation of the premises why such tenant or person should not enter into a recognizance by himself and two sufficient sureties in a reasonable sum conditioned to pay the costs and damages which shall be recovered by the claimant in the action. Rule or summons for the tenant to give bail.

(3) The court or judge upon cause shown (or upon affidavit of the service of the rule or summons in case no cause is shown) make the same absolute in the whole or in part, and may order such tenant or person within a time to be fixed upon a consideration of all the circumstances to find such bail with such conditions and in such manner as shall be specified in the said rule or summons or such part of the same so made absolute. On rule or summons absolute if tenant shall not conform judgment to be for the landlord.

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(4) If the party neglects or refuses to find such bail as aforesaid, and lays no ground to induce the court or judge to enlarge the time for obeying such order of the court or judge, then the lessor or landlord filing an affidavit that such rule or order has been made and served and not complied with, may sign judgment for recovery of possession and costs of suit in the form contained in the Schedule (D) to this Act, or to the like effect, or in such other form as the judges of the Supreme Court may order.

An application for security for costs by the landlord was refused where the landlord was the assignee of the reversion in fee from the original lessor, and did not produce a lease direct from himself to the lessee : *Marks v. Stanfield*, 10 W.N. 156.

The requirement of the section that the lease must be proved is essential : *Moring v. Soltan*, (1885) 1 W.N. 164 ; but if the Statute is complied with the right to security is absolute : *Moring v. Soltan*, (1885) 1 W.N. 165. But the Court may apparently refuse to make the order if satisfied that the defendant has a good defence : *Lehane v. Johnson*, (1899) 16 W.N. 46.

This and the following sections re-enact 1 Geo. 4, c. 87.

The words "under a lease or agreement in writing" apply to the whole sentence, and are not confined to the case of a tenant holding for a "term or number of years certain" : *Doe d. Bradford v. Roe*, 5 B. & A. 770. A letting by parol, therefore, will not suffice : *Doe d. Stepney v. Thrustout*, M'Clel. & Y. 492 ; but an agreement in writing to hold apartments for three months has been held to be within this section ; *Doe d. Phillips v. Roe*, 5 B. & A. 766. A holding from quarter to quarter, with an agreement to quit on three months' notice, is not a holding for a term, or number of years certain : *Doe d. Carter v. Roe*, 2 Dowl. N.S. 449 ; nor is a tenancy for a term of years "should A., B. and C. so long live" : *Doe d. Pemberton v. Roe*, 7 B. & C. 2.

The term must have expired or been determined by regular notice to quit : therefore a tenant who has surrendered his term, but refuses to quit the premises, cannot be proceeded against under this section : *Doe d. Tindal v. Roe*, 2 B. & Ad. 922 ; nor can a tenant who has determined his interest, by notice to quit, and holds over : *Doe d. Cardigan v. Roe*, 1 D. & R. 540 ; nor a tenant who has been permitted to hold over for more than a year after his interest had expired ; a tenancy from year to year having been thereby created : *Doe d. Thomas v. Field*, 2 Dowl. 542.

The statute only applies to terms that have come to a natural end, or been extinguished by regular notice : *Doe d. Tindal v. Roe*, (*supra*). It does not apply where a right of entry is claimed for non-performance of covenants : *Doe d. Cundley v. Sharpley*, 15 M. & W. 558 ; nor where the title to the premises is in dispute : *Doe d. Saunders v. Roe*, 1 Dowl. 4.

A tenant may avail himself of the statute against his under-tenant : *Doe d. Watts v. Roe*, 5 Dowl. 513 ; and a tenant in common may take advantage of it : *Doe d. Morgan v. Rotherham*, 3 Dowl. 690.

The demand of possession must be in writing.

It must be served personally, or left at the dwelling-house or usual abode of the tenant. Where the tenant had gone to America, service of the demand, by leaving the demand on the premises (the tenant's wife, who was in possession, having refused to take it), was held only sufficient to entitle the landlord to a rule *nisi* to show cause why the service should not be deemed good service : *Doe d. Selgood v. Roe*, 1 W.W. & H. 206.

If the tenant refuses to deliver up possession, according to the demand, the landlord may then sue out a writ of ejectment, and at the foot of it address a notice to the tenant requiring him to find bail, if ordered by the court, or a judge, in the terms of the section.

The notice should be signed by the landlord or his agent : *Anon.*, 1 D. & R. 435 ; *Doe d. Beard v. Roe*, 1 M. & W. 300 ; but no affidavit of the fact of the agency, if it is signed by an agent, is necessary : *Doe d. Gelbart v. Roe*, 1 W.W. & H. 346 ; the writ and notice are to be served as an ordinary writ of ejectment : s. 121, n. (*ante*).

If the tenant does not appear to the writ, there may be judgment against him as above provided.

If the tenant enters an appearance, the landlord may proceed either by motion *nisi* before the court or by summons in chambers, calling on the tenant to show cause in the terms of the section. The motion or summons is founded on affidavits of service of the writ and notice, proof of the lease : *Moring v. Soltan*, 1 W.N. 164 ; see *Doe d. Caulfield v. Roe*, 3 N.C. 329 ; *Doe d. Holden v. Bushworth*, 4 M. & W. 74 ; *Doe v. Gauland v. Roe*, 6 Dowl. 35 ; occupation under the lease : *Doe d. Forcan v. Roe*, 2 L.M. & P. 322 ; and that the interest of the tenant has expired or been determined by a regular notice to quit : *Doe d. Topping v. Boast*, 7 Dowl. 487 ; and that

possession has been lawfully demanded in terms of the section. The affidavit should also state the annual value of the property so as to enable the court to fix the amount of security. **C.L.P. Act, s. 251.**

The rule *nisi*, or summons, may require that the claimant shall be at liberty to sign judgment, if the defendant does not give security within the time limited: *Doe v. Roe*, 2 Dowl. 180.

A retaking of the premises by the defendant may be shown for cause against the rule or summons: *Roe d. Durant v. Doe*, 6 Bing. 574. If no cause is shown against the rule or summons, then on the usual affidavit of service the rule will be made absolute, or an order upon the summons will be made at chambers.

In cases under this section, the court will only give a reasonable sum for the costs, and nothing for mesne profits: *Doe d. Sampson v. Roe*, 6 Moore, 54; or for damages alleged to have been caused to the value of the premises for the purposes of trade: *Doe d. Marks v. Roe*, 6 D. & L. 87.

If bail is ordered, the time within which the recognizance is to be entered into should be fixed by the rule absolute, or order at chambers: *Doe d. Anglesea v. Brown*, 2 D. & R. 688.

Bail is put in, in the ordinary way, and the tenant should join. The recognizance is ordinarily to the extent of a year's value of the premises, and a reasonable sum for costs to be computed by the master: *Doe d. Levi v. Roe*, 6 C.B. 276; see *Lehane v. Johnson*, (1899) 16 W.N. 46.

s. 12. (1) Wherever it appears on the trial of any ejectment at the suit of a landlord against a tenant that such tenant or his attorney has been served with due notice of trial the judge before whom such cause comes on to be tried shall, whether the defendant appears upon the trial or not, permit the claimant on the trial after proof of his right to recover possession of the whole or any part of the premises mentioned in the writ in ejectment to go into evidence of the mesne profits thereof which have or might have accrued from the day of the expiration or determination of the tenant's interest in the same down to the time of the verdict given in the cause or to some preceding day to be specially mentioned therein. In ejectment between landlord and tenant mesne profits down to the verdict or to a day specified therein may be recovered.

(2) The jury on the trial finding for the claimant shall in such case give their verdict upon the whole matter both as to the recovery of the whole or any part of the premises, and also as to the amount of the damages to be paid for such mesne profits, and in such case the landlord shall have judgment within the time herein before provided not only for the recovery of possession and costs but also for the mesne profits found by the jury.

(3) Nothing hereinbefore contained shall be construed to bar any such landlord from bringing any action for the mesne profits which shall accrue from the verdict or the day so specified therein down to the day of the delivery of possession of the premises recovered in the ejectment.

Damages may be recovered under this section for mesne profits down to the day of trial, though no notice of trial is proved (if the defendant appears at the trial) and although no notice of claim of mesne profits has been given: *Doe d. Thompson v. Hodgson*, 12 Ad. & E. 135; *Smith v. Tett*, 9 Exch. 307; but strict proof of title is required: and, therefore, where the defendant does not appear, it may sometimes be prudent not to proceed for the mesne profits which may be recovered in a subsequent action: s. 14 (*post*); wherein the plaintiff's title will be protected by estoppel through the judgment in ejectment.

A plaintiff is entitled to recover as mesne profits the rent he might have obtained but for the defendant's holding over, together with interest on a sum offered as a bonus for the goodwill of the premises; but not special damages for the loss occasioned by his being unable to enter into such a contract: *Lee v. Blakeney*, (1887) 8 N.S.W.R. 141, 3 W.N. 119.

As to judgment, see C.L.P. Act, s. 228 (*ante*).

s. 13. (1) In all cases in which such security has been given as aforesaid if upon the trial a verdict passes for the claimant, unless it appears to the judge before whom the same has been had that the finding of the jury was contrary to the evidence, or that the damages given were excessive, such judge shall not (except by consent) make any order to stay judgment or execution, except on condition that within four days from the day of the trial the defendant shall actually find security by the recognizance of himself and two sufficient sureties in such reasonable sum as the judge directs conditioned not to commit any waste or act in the nature of waste On trials after bail found Judge shall not stay the execution except by consent or on tenant's finding security.

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S. 251.**

Recognizances
to be taken as
the Judges
direct.

17 Vic. No. 21,
s. 167.

Saving of former
remedies.
Ibid. s. 168.

Rules may be
made and times
altered.

Ibid. s. 174.

or other wilful damage, and not to sell or carry off any standing crops, hay, straw, or manure produced or made (if any) upon the premises, and which may happen to be thereupon, from the day on which the verdict has been given to the day on which execution is finally made upon the judgment or the same be set aside as the case may be.

(2) All recognizances and securities entered into as last aforesaid shall be taken respectively in such manner and by and before such persons as the judges direct, and shall be filed with the prothonotary, for which respectively the sum of two shillings and sixpence and no more shall be paid.

(3) No action or other proceeding shall be commenced upon any such recognizance or security, after the expiration of six months from the time when possession of the premises or any part thereof has actually been delivered to the landlord.

S. 14. Nothing herein contained shall be construed to prejudice or affect any other right of action or remedy which landlords may possess in any of the cases hereinbefore provided for otherwise than hereinbefore expressly enacted.

See C.L.P. Act, s. 250 (*ante*).

S. 15. The judges of the Supreme Court may make all such general rules and orders for the effectual execution of this Part of this Act, and of the intention and object hereof, and for fixing the costs to be allowed for and in respect of the matters in this Part contained, and the performance thereof and also for altering the number of days by this Part of this Act limited for the doing of anything by this Part of this Act prescribed or authorised to be done, and substituting other days for the same as in their judgment is necessary or proper.

Conveyancing and Law of Property Act, 1888 (No. 17).

In ejectment by mortgagee the mortgagor's rendering the principal interest and costs in Court shall be deemed a full satisfaction and the Court may compel the mortgagee to re-convey.

Ibid. s. 109.

S. 106. Where an action of ejectment is brought by any mortgagee, his heirs executors, administrators or assignees for the recovery of the possession of any mortgaged lands, tenements, or hereditaments, and no suit is then depending in equity for or touching the foreclosing or redeeming of such mortgaged premises if the person having right to redeem and who appears and becomes defendant in such action, pays to such mortgagee at any time pending such action, or in case of his refusal brings into court all the principal moneys, and interest due on such mortgage, and also all such costs as have been expended in any suit at law or in equity upon such mortgage (such money for principal, interest, and costs to be ascertained and computed by the court or the proper officer in that behalf), the moneys so paid to such mortgagee or brought into court shall be deemed and taken to be in full satisfaction and discharge of such mortgage, and the court shall discharge every such mortgagor or defendant of and from the same accordingly, and shall, by rule of the same court, compel such mortgagee at the costs and charges of such mortgagor to assign, surrender, or re-convey such mortgaged premises and such estate and interest as such mortgagee has therein, and deliver up all deeds, evidences, and writings in his custody relating to the title of such mortgaged premises unto such mortgagor who has paid or brought such moneys into court, his heirs, executors, or administrators, or to such other person or persons as he or they shall for that purpose nominate or appoint.

An application for a stay of proceedings under this section ought to be made before execution executed, and ought to be founded on an affidavit that no suit in equity is pending. The defendant must have appeared to the action : *Doe d. Huss v. Clifton* 4 A. & E. 814 ; *Doe d. Cox v. Brown*, 6 Dowl. 471.

The court may make the re-payment to the mortgagee of his expenses of putting up the mortgaged property to sale a condition of a rule to stay proceedings in the action : *Dowle v. Neale*, 10 W.R. 627, Ex. E.T. 1862.

Where there has been an assignment of a mortgage, and a reconveyance to the mortgagor, and then a re-mortgage to the same mortgagee, the original mortgage and the re-conveyance, as they form links in the title, should be delivered up under the usual order under this section : *Hudson v. Malcolm*, 10 W.R. 720.

The application ought to be made before executing execution against the mortgagor; but where the premises were in the possession of a tenant of the mortgagor who did not appear, and the claimant obtained judgment by default, and recovered possession, the court would have set aside the judgment and execution in order to let in the mortgagor to apply for a stay of proceedings, if the mortgagee had not consented to take what was due on the mortgage and restore possession : *Doe d. Tubb v. Roe*, 4 Taunt. 887.

The provisions of this section do not apply to cases where the mortgagee is in possession : *Sutton v. Rawlings*, 3 Exch. 407. Upon staying proceedings, the costs are to be taxed as between party and party, and not as between attorney and client : *Doe d. Cupps v. Cupps*, 3 N.C. 768. **G.L.P. Act, S. 251.**

It may be observed that under 7 Geo. 2, c. 20, s. 1 (if that Statute is in force here) the court will stay proceedings in an action of *covenant* on a mortgage deed ; as that statute extends to actions brought " on any bond for payment of the money secured by the mortgage : *Smeeton v. Collier*, 1 Exch. 457.

S. 107. (1) Nothing in the preceding section contained shall extend to any case where (a) the person against whom the redemption is prayed shall (by writing under his hand, or the hand of his agent or solicitor, to be delivered before the money is brought into court to the solicitor for the other side) insist either that the party praying a redemption has not a right to redeem, or that the premises are chargeable with other or different principal sums than what appear on the face of the mortgage or are admitted on the other side, or (b), the right of redemption to the mortgaged lands and premises in question in any cause or suit is controverted or questioned by or between different defendants in the same cause or suit. Not to extend to cases where the right of redemption is controverted or the money due not adjusted: 17 Vic. No. 21, s. 170.

(2) Nothing in the preceding section contained shall prejudice any subsequent mortgage or subsequent incumbrance. or to prejudice any subsequent mortgage.

In answer to a rule *nisi* obtained under s. 106, it is sufficient to show the delivery of a notice in writing to the mortgagee, stating that the mortgagee disputes the mortgagor's right to redeem : *Filbee v. Hopkins*, 6 D. & L. 264. In other cases where notice may be given by the mortgagee, enough ought to be stated to enable the court (when cause is shown against the rule) to determine what the question is between the parties, and to decide whether a case for the exercise of the jurisdiction of a court of common law properly arises or not : *Doe d. Harrison v. Louch*, 6 D. & L. 270 ; see also *Goodtitle v. Pope*, 7 T.R. 185 ; and as to imposing terms, see *Sutton v. Rawlings*, 3 Exch. 407.

PART XXII.

HABEAS CORPUS.

252. Where the Court grants a rule to show cause why a writ of habeas corpus should not issue, the Court, on the return of such rule, and the appearance of the party called on to show cause, or on proof of service of such rule, may make all such orders as might be made after issue of the writ, and the bringing up of the body. Facilitating process in habeas corpus cases. 46 Vic. No. 17, s. 453.

Provided that any such writ may be issued after the return of the rule, if the Court thinks fit.

"In cases to which a Habeas Corpus is applicable the section dispenses after a rule to show cause, with the actual issuing of the writ. The next section enables the court, notwithstanding the ordinary rule of law, that the return is conclusive in that proceeding, to take evidence as to the matters in controversy and deal with the case accordingly." (Note by Sir. A. Stephen and Oliver, Crim. Law Am. Act).

Practice.—"When the application was first made to me in Chambers, I could have granted a rule absolute, and the applicant would have been before the court to-day ; but the present practice under ss. 453—455 of the Crim. Law Am. Act 1883, is to have the matter argued on a rule *nisi*, after which the court may or may not issue the writ. We have now to consider whether the arguments brought forward by the Crown would, if endorsed on the writ, be a good return," *per Darley*, C. J. *Ex p. L. Palk*, (1888) 9 N.S.W.R. 221.

"A rule has been granted calling upon (a respondent) to show cause why a writ of *habeas corpus* should not issue. The respondent has filed an affidavit. This is equivalent to, and now stands in the place of a return to a writ of *habeas corpus*, supposing such writ had issued in the first instance," (*ibid*).

"It is usual to grant a rule *nisi* in these cases" (custody of children) : *In re Mitchell*, (1892) 9 W.N. 67.

**C.L.P. Act,
S. 253.**Proceedings
thereupon.46 Vic. No. 17,
s. 454.

253. (1) On the return of any such writ or rule, where the truth of the return, or any matter shown for cause is disputed, the Court may refer such return or matter to any officer of the Court, or Commissioner for Affidavits, for the taking of evidence thereon, orally or by affidavit, and, for the purposes of such reference, may make all necessary orders for the attendance of witnesses and otherwise.

(2) On the completion of the evidence, the Court may dispose of the case as the circumstances appear to require, with costs to be paid by and to any party, or without costs, as the Court thinks fit.

See notes to preceding section.

Power of a
Judge therein
in vacation.*Ibid* s. 455:

254. The powers conferred by the last preceding two sections respectively may in vacation be exercised by a Judge, and the word "Court" shall for that purpose be taken equally to mean a Judge.

"Vacation" under the Act 4 Vic. No. 22, s. 27, has always been held to mean any time not term; see notes to s. 20 of the Supreme Court and Circuit Courts Act, 1900.

The powers conferred by this section on a judge do not limit the right of an applicant, who may go from court to court and from judge to judge and renew his application: *Ex p. Rowlands*, (1895) 16 N.S.W.R. 239.

PART XXIII.

AFFIDAVITS AND EVIDENCE.

Affidavits on
new matter.20 Vic. No. 31,
s. 18.

255. Upon motions founded upon affidavits either party may with leave of the Court or a Judge make affidavits in answer to the affidavits of the opposite party upon any new matter arising out of such affidavits, subject to any rule of Court respecting such affidavits.

As to the general form of affidavits, see RR. 381, *et seq.* (*post*).

As to filing affidavits in the ordinary course, see RR. 321, 323 (*post*).

The leave of the court should not be applied for until the "new matter" has been brought before the court in the usual course upon the argument of the rule: see *Hayne v. Robertson*, 16 C.B. 554; 24 L.J. C.P. 155; and *Wood v. Cox*, 16 C.B. 494; 24 L.J. C.P. 155; *Swinfen v. Swinfen*, 1 C.B., N.S. 364; 26 L.J. C.P. 97. This rule seems consistent with convenience, since the further affidavits may be quite unnecessary, in which case they should not be made; but until argument it may not appear to the court whether they are, or are not necessary; besides it would only be through abuse of the courtesy of counsel to one another, that the "new matter" contained in affidavits in answer (which, indeed, may, very possibly, not be used at all) could become known to those who seek to reply to them: see *Wood v. Cox* (*supra*); and *per Cresswell, J.*, in *Swinfen v. Swinfen*, 1 C.B., N.S. 366; 26 L.J. C.P. 98.

On a rule for a new trial, on the ground of the improper rejection of evidence, the affidavit in answer alleged that it was withdrawn and not rejected, it was held that an affidavit in reply, stating how it came to be withdrawn, was not receivable under this section: *Whitehouse v. Hemmant*, 27 L.J. Ex. 295.

Production of
documents and
examination of
witnesses upon
motions and
summonses.*Ibid*, s. 19

256. Upon the hearing of any motion or summons the Court or Judge may, upon such terms as the Court or Judge thinks reasonable, order any document to be produced, and any witness to appear and be examined *viva voce*, either before the

Court or a Judge or before a Commissioner for Affidavits ; and **C.L.P. Act, s. 256.** upon hearing such evidence or reading the deposition may make such rule or order as may be just.

See *Bennett v. Bayes*, 1 L.T., N.S. 69.

In *Roberts v. Evans*, 6 B. & S. 2, 3; 34 L.J.Q.B. 7, an arbitrator was ordered to attend before the master to be examined as to whether he had enlarged the time for making his award within the prescribed time; the arbitrator having refused to make an affidavit as to the fact.

In *Thomas v. Stutterheim*, 5 W.R. 6, the court refused, under this section, to grant a rule absolute in the first instance for the examination of a witness at the point of death; and it would seem that the section is intended only to provide evidence upon otherwise pending motions or summonses: see *Ashcroft v. Foulkes*, 18 C.B. 261; 25 L.J. C.P. 202.

See an order under this section in *Re Solling*, (1893) 10 W.N. 56. The court refused an order *before the hearing* (of a motion to oust an alderman) for production of documents by a witness, saying that the section referred to applications at the hearing: *Ex p. McNeil*, (1896) 12 W.N. 137.

257. (1) The Court or Judge may by such rule or order, or by any subsequent rule or order, command the attendance of the witnesses named therein for the purpose of being examined or the production of any documents mentioned therein.

Proceedings before and upon such examination.

20 Vic. No. 31, s. 20.

(2) Such rule or order shall be proceeded upon in the same manner, and shall have the same force and effect as a rule or order under the provisions of the fifteenth section of the Act fifth Victoria number nine.

(3) The Court or Judge or such Commissioner may adjourn the examination from time to time as occasion requires.

(4) The proceedings upon such examination shall be conducted and the depositions taken down as nearly as may be in the same manner as in the case of a *viva voce* examination under the said Act.

Section 15 of the Act 5 Vic. No. 9; see now s. 4 of the Witnesses Examination Act, No. 34, 1900 (*post*), referring to the taking of evidence upon commission.

258. (1) Any party to any civil proceeding or motion for a criminal information requiring the affidavit of a person who refuses to make an affidavit may apply by summons for an order to such person to appear and be examined upon oath before a Judge or a Commissioner for Affidavits as to the matters concerning which he has refused to make an affidavit.

Persons refusing to make affidavits:

Ibid. s. 21.

(2) A Judge may make such order for the attendance of such person before the person therein appointed to take such examination for the purpose of being examined as aforesaid, and for the production of any writings or documents to be mentioned in such order, and may therein impose such terms as to such examination and costs of the application and proceedings thereon as he thinks fit.

(3) Such order shall be proceeded upon in the same manner as a rule or order under the provisions of the fifteenth section of the Act fifth Victoria number nine.

Ibid. s. 22.

(4) The proceedings upon such examination shall be conducted and the depositions taken down and returned as nearly as may be in the same manner as in the case of a *viva voce* examination under the said Act.

Section 15 of 5 Vic. No. 9, now s. 4 of the Witnesses Examination Act, No. 34, 1900 (*post*).

**C.L.P. Act,
S. 259.****PART XXIV.****AMENDMENT.**Power of
amendment.12 Vic. No. 1,
s. 3.

259. The Court or a Judge may amend any notice of motion, rule nisi, summons, writ, pleading, affidavit, jurat or title of affidavit, record, præcipe, or other proceeding used before the Court or Judge in any matters that appear to the Court or Judge not likely to mislead the opposite party on any point essential to the merits of the case, and may award such reasonable costs of such amendment as to the Court or Judge seem fit.

This and the next succeeding section give the court and judges very full powers of amendment; but it is in the nature of the case a matter of discretion with the particular tribunal applied to, and it is impossible to lay down any rule as to when and under what circumstances that discretion will or will not be exercised.

On an application to amend pleadings after demurrer, *Cohen, J.*, said: "No doubt the general principle is that almost up to any stage before a dispute is determined in these courts an amendment will be allowed, provided compensation is made to the other side in costs": *Waller v. Young*, (1898) 15 W.N. 105. In *Stubbs v. McSweeney*, (1897) 18 N.S.W.R. 50, defendant was allowed to amend his plea on a new trial motion, although a consent verdict had been taken with leave to move and the point raised by the new plea had not been mentioned at the trial. Amendment of name of plaintiff in writ and declaration was allowed, the name in the original writ being only plaintiff's business sign: *Ye Sing v. Lion Insurance Co.*, (1884) 1 W.N. 61. An amendment of a plea has been allowed on the hearing of a demurrer: *Jacobs v. Smith*, (1887) 8 N.S.W.R. 21; 3 W.N. 98. Where proof varied from the declaration, and there was no application to amend at the trial (before a District Court judge) on plaintiff moving for a new trial, he was allowed to amend on payment of costs: *Bryden v. Wells*, (1897) 14 W.N. 60.

After judgment and execution against plaintiff, defendants obtained an order amending the record by substituting the "Borough of Windsor" for the "Mayor and Aldermen of the Borough of Windsor": *Davies v. The Borough of Windsor*, (1883) 4 N.S.W.R. 335.

A count setting up a novation of a contract allowed to be added at the trial: *Morehead v. McIsaacs*, (1866) 5 S.C.R. 295.

The title of an affidavit was amended: *Ex p. Pollard*, (1863) 2 S.C.R. 192.

On *quo warranto* to the "Lord Bishop of Newcastle," the rule was allowed to be amended by adding the private name of the defendant: *R. v. Bishop of Newcastle*, (1862) 1 S.C.R. 262.

On the other hand, where a rule *nisi* called upon a respondent to show cause "why the members of the Land Court should not be compelled by order of this Honorable Court to state and submit a case" instead of saying "why a writ of *mandamus* should not issue, etc." the court refused to allow the rule to be amended, saying that it would "change the nature of the application:" *Ex p. Campbell* (1898) 14 W.N. 144; followed in *Ex p. McDonald*, (1898) 15 W.N. 32; *Ex p. Hay*, (1899) 15 W.N. 228.

A plea which is demurrable or open to grave question ought not to be allowed to be pleaded at the trial: *James v. Watts*, (1868) 8 S.C.R. 81.

The court refused leave to amend a petition of right under the Act 24 Vic., No. 27 (now repealed): *Oriental Bank v. The Queen*, (1867) 6 S.C.R. 273.

See also under the different special heads, and generally, Chitty's Archbold, 1557, *et seq.*

Power of
amendment.5 Vic. No. 9,
s. 38.17 Vic. No. 21,
s. 172.

260. (1) The Court or a Judge or any Circuit Court may at all times amend all defects and errors in any proceeding in civil causes, whether there is anything in writing to amend by or not and whether the defect or error is that of the party applying to amend or not. All such amendments may be made with or without costs and upon such terms as to the Court or Judge seem fit.

(2) All such amendments as are necessary for the purpose of determining in the existing suit the real question in controversy between the parties shall be so made.

See notes to previous section.

PART XXV.

C.L.P. Act,
S. 260.

COSTS.

1. ON VERDICT FOR PLAINTIFF :—

As a general rule the plaintiff succeeding in the trial of an action is entitled to his costs. This right is based on the statute of Gloucester (6 Ed. 1, c. 1). But certain exceptions have been engrafted by statute upon this general rule, the most general exception being that now contained in s. 267 (*infra*), where a plaintiff recovers less than £30; see notes to that section. Further by the Defamation Act, 1901, s. 9, it is provided that "if in any action for defamation a verdict is returned in favour of the plaintiff for damages in any sum less than forty shillings, the plaintiff shall have judgment to recover such sum only, and shall not have judgment to recover any costs, unless the judge in any case of libel certifies that the words charged as defamatory were published without reasonable grounds or excuse."

In case, therefore, of an action for slander in which the plaintiff recovers less than 40s. damages, he cannot recover any costs. In case of an action for libel and verdict for less than 40s., the plaintiff may recover costs if he gets a certificate under s. 267 (*infra*) and also a certificate under this section of the Defamation Act, "that the words were published without reasonable grounds or excuse." See on this, *Palmer v. Verge*, (1901) 18 W.N. 251. It had been enacted by the Act 21 Jac. 1, c. 16, s. 6, that a plaintiff in slander recovering less than 40s. should get no more costs than the damages given; but this section was held by the court here, and by the Privy Council to be impliedly repealed by the Defamation Act, 11 Vic. No. 13: *Davies v. Harris*, (1883) 4 N.S.W.R. 315; 6 N.S.W.R. 46.

Trespass.—In actions for trespass to land, where by the pleadings, title and possession are admitted by the defendant, the plaintiff may begin his action afresh in the District Court; if he does not do so, and recovers less than £200, he is only entitled to costs on the District Court scale: s. 120 (*ante*).

This Act has been held not to apply to an action for injury to the reversion: *Lorton v. Waterhouse*, (1891) 7 W.N. 98; so also where an injunction has been claimed (*ibid*); *sed. v. St. John's College v. Pierrepont*, 61 L.J. Q.B. 19; but this case has been overruled: *Keates v. Woodward*, (1902) 1 K.B. 532.

In *Kirkpatrick v. Wilson*, (1893) 14 N.S.W.R. 257; 9 W.N. 182, on a trespass action, money had been paid into court, and the action thereupon recommenced in the District Court under this Act, and a verdict there found for the defendant. Held, that one bill of costs should be brought in and the portion referring to the Supreme Court action taxed by the prothonotary and the remainder by the registrar of the District Court, and further (in spite of the words, "costs to abide the event") that plaintiff was entitled to his costs in the Supreme Court up to plea; that those costs only should be costs in the cause abiding the event, which were costs in abeyance abiding the event according to the practice of the Supreme Court.

See also *Kobb v. Rickatson*, (1886) 2 W.N. 113.

In addition to the New South Wales Statutes there are certain English statutes to be considered.

By the Act 43 Eliz., c. 6, s. 2, it was enacted as follows:—If upon any action personal to be brought in any of Her Majesty's Courts at Westminster not being for any title nor interests of lands nor concerning the freehold or inheritance of any lands, nor for any battery it shall appear to the judges for the same court and be so signified or set down by the justices before whom the same shall be tried that the debt or damages to be recovered therein in the same court shall not amount to the sum of 40s. or above that in every such case the judges and justices before whom any such action shall be pursued shall not award for costs to the party plaintiff any greater or more costs than the sum of the debt or damages so recovered shall amount unto but less at their discretion.

This Statute has been held to be in force in this State: *Burt v. Goyder*, (1862) 10 S.C.R. 109 (*in nota*). In that case, *Stephen*, C.J., having granted a certificate under the District Courts Act (now s. 267, *infra*) thought he ought also to certify under this statute, thus reducing the costs to the amount of the verdict (which was below 40s.); but the judge afterwards revoked this second certificate, holding that he had a discretion under this Act (*ibid*). His certificate under this Act is to deprive the plaintiff of costs: see the form, Chitty's Forms, 224; and see Chitty's Archbold, 474. But in *Moore v. Haynes*, (1881) 2 N.S.W.R. 350, where a certificate was granted under the District Courts Act (now s. 267, *infra*) it was held that it would be inconsistent with this to further give a certificate under the Statute of Elizabeth; so that this Statute may be regarded as practically obsolete.

**G.L.P. Act,
§. 260.**

By s. 136 of the Act 22 and 23 Car. II, c. 9, it was enacted as follows :—

In all actions of trespass, assault and battery and other personal actions wherein the judge at the trial of the cause shall not find and certify under his hand upon the back of the record that an assault and battery was sufficiently proved by the plaintiff against the defendant or that the freehold or title of the land mentioned in the plaintiff's declaration was chiefly in question, the plaintiff in case the jury shall find the damages to be under the value of 40s. shall not recover or obtain more costs of suit than the damages so found shall amount to.

This Statute appears to be in force here : *Major v. Bullock*, (1880) 1 N.S.W.R. 139 ; but where a justification is pleaded no certificate is necessary (*ibid.*). In spite of the words "other personal actions," it has been settled by English decisions that the Statute is confined to actions of assault and battery and actions for trespass, *qu. cl. fr.*, 3 Wils. 329. The certificate need not be granted at the trial : 3 Mod. 39. Where the defendant lets judgment go by default or justifies the assault and battery or pleads in such a manner as to bring the freehold or title of the land in question on the face of the record, a certificate is unnecessary.

By the Statute 8 and 9 Will. 3, c. 11, s. 4, it is enacted that in all actions of trespass wherein at the trial it shall appear and be certified upon the back of the record that the trespass upon which any defendant shall be found guilty was wilful and malicious the plaintiff shall have full costs.

This Statute has been held to be in force here : *Brown v. Russell*, (1862) ; *Foster D.C. Practice App. 252* ; but would seem to be impliedly repealed by s. 120 (*ante*), in cases coming under that section.

Summary—*Verdict for £30 or less, but above 40s.*—In case, therefore, of verdict for the plaintiff for £30 or less, but above forty shillings, plaintiff will be entitled to his full costs only on obtaining a certificate under s. 267 (*infra*) except in actions for trespass coming under s. 120 (*ante*).

Slander, verdict under 40s.—In slander, on a verdict for less than 40s. the plaintiff can recover no costs.

Libel, verdict under 40s.—In libel, on verdict under 40s. the plaintiff can recover costs if in addition to the certificate under s. 267 the judge grants a certificate under the Defamation Act (*supra*).

Assault and battery, verdict under 40s.—In assault and battery on verdict under 40s. plaintiff (even if the judge certifies under s. 267, *post*) only gets the same amount of costs as damages unless the judge further certifies that an assault and battery was sufficiently proved (22 and 23 Car. II, c. 9), unless justification is pleaded (*supra*).

Trespass to land, verdict under £200.—In trespass to land where title is not in question, plaintiff getting any verdict not exceeding £200 is entitled to costs on the District Court scale only, s. 120 (*ante*) ; even though the trespass were wilful and malicious (*semble*).

Trespass qu. cl. fr. verdict under 40s., title in question.—If, however, title to land be in question, and so appears on the record, even where the verdict is under 40s., a certificate under s. 267 (*infra*) will give plaintiff his costs.

Other cases, verdict under 40s.—In other cases on a verdict under 40s. the judge may certify under the Statute of Elizabeth and so reduce the plaintiff's costs to the amount of damages recovered. But his giving a certificate under s. 267 implies a refusal to certify under the Statute of Elizabeth : *Moore v. Haynes* (*supra*).

Actions on judgments.—By Statute 43 Geo. 3, c. 46, s. 4, it is enacted that in all actions which shall be brought in England or Ireland from and after the 1st day of June in the year of our Lord 1803 upon any judgment recovered or which shall be recovered in any court in England or Ireland the plaintiff or plaintiffs in such action on the judgment shall not recover or be entitled to any costs of suit unless the court in which such action on the judgment shall be brought or some judge of the same court shall otherwise order.

This statute has been held in part not applicable here : *Kittler v. Murphy*, (1872) 11 S.C.R. 68 ; but as to other parts applicable : *Bayless v. Dixon*, (1883) 4 N.S.W.R. 62, and there seems no reason why this section should not be held to apply here.

The sections extends only to actions brought upon judgments obtained by plaintiffs *Bennett v. Neale*, 14 East 343. In such actions the plaintiff will not in general be allowed his costs if he might have issued execution or realised all he would be entitled to recover in the action in any other way : *Wood v. Silletto*, 1 Chit., Rep. 473 ; but if the action be brought in order to have personal execution, which plaintiff could not otherwise have obtained, he will be allowed his costs : *Slater v. Mackie*, 8 C.B.

553; 19 L.J. C.P. 88. Where action is brought on a judgment, and also on another distinct cause of action, on general verdict plaintiff is entitled to his whole costs of suit without any order: *Jackson v. Everett*, 31 L.J. Q.B. 59; 1 B. & S. 857. The application under the act may be made to the Full Court or to a judge in chambers not at nisi prius: *Jones v. Lake*, 8 C. & P. 395; (in England; but *quære* here). In general it should be made to a judge at chambers: *Claridge v. Wilson*, 26 L.J. Ex. 246, and on summons to show cause.

**C.L.P. Act,
s. 260.**

ON VERDICT FOR DEFENDANT:—

Generally.—“At common law the defendant was not entitled to costs, and he was wholly without remedy for any expenses he had been put to, if he had a verdict or the plaintiff was nonsuited, the amercement to which the plaintiff was subjected in such a case, *pro falso clamore suo*, going entirely to the Crown. But by Statutes 23 H. 8, c. 15, and 4 Jac. 1, c. 3, in all cases in which the plaintiff would be entitled to costs if he recovered, the defendant shall have his costs if a verdict be found for him or the plaintiff be nonsuited. Also by Statute 18 Eliz. c. 5, in actions upon penal statutes by common informers, the defendant is entitled to his costs if the plaintiff willingly delays the suit or discontinues or becomes nonsuit, or has a verdict or judgment against him, though the plaintiff would not be entitled even if he succeeded (*Chitty's Archbold* 496). This passage sufficiently summarises the general law.

Actions by executors and administrators.—Executors and administrators suing in their representative capacity were not liable to costs on nonsuit or verdict for defendant, but by s. 7 of the General Legal Procedure Act 1902, re-enacting s. 28 of the Act 5 Vic. No. 9, they are made liable to costs as though they were suing in their own right; see that Act, *post*.

As to joint defendants, see s. 261 (*infra*), and s. 39 (*ante*).

For costs in particular cases see the special heads.

Double and treble costs.—In certain cases by Statute double and treble costs are allowed. Double costs are estimated in this way: First allow single costs, including witnesses expenses; then allow one half of the single costs without any deduction for counsel's fees, etc. Treble costs are the single costs, half of the single costs, and half of that half: *Stanniland v. Ludlow*, 4 B. & C. 889; *Phillips v. Bacon*, 1 Chit. Rep. 137 (n); *Buckle v. Berne*, 4 B. & C. 154. See *Chitty's Archbold* 506.

What costs allowed.—As to what costs are allowed on taxation see s. 266 (*infra*), and notes thereon.

Security for costs.—In certain cases a defendant may apply for security for costs. *As to this see generally Chitty's Archbold* 1414, *et seq*.

Grounds of Application.—If the plaintiff permanently resides abroad he will be ordered to give security. This was so held even where plaintiff resided in an adjoining colony: *Blitz v. Beer*, (1884) 1 W.N. 24; *McWhinnie v. Union S.S. Co.*, (1886) 2 W.N. 73, though under the Creditors Remedies Act, 19 Vic. No. 12 (now the Interstate Debts Recovery Act, 1901, *post*) a judgment of this Court might be enforced in that State (*ibid.*): but held otherwise since the (Commonwealth) Service and Execution of Process Act, 1901, *post*: see *Conrad v. Muston*, (1903) 20 W.N. 28. Where a plaintiff (or one of two plaintiffs) is temporarily resident here in order to bring the action, security cannot be ordered: *Bryant v. Commercial Banking Co.*, (1898) 15 W.N. 108; *Tamblyn v. Stéphen*, (1890) 6 W.N. 161. Mere temporary absence of a person permanently resident here will not entitle defendant to security: *Henshen v. Garves*, 2 H. Bl. 383; but intention of a foreigner to return is not enough: *Stockton v. Smith*, (1884) 1 W.N. 57. Where on the evidence the judge held that the plaintiff was not a “resident” of New South Wales, although he had been living here when he had brought the action, but had since gone abroad again, security was ordered: *Lingham v. National Cash Register Co.*, (1901) 18 W.N. 252. Where security had been ordered against a plaintiff residing in Victoria, and he afterwards came and lived in this State, but did not state he was permanently residing here, an application to rescind the previous order was refused: *Williams v. Moss*, (1881) T.T.R. 30.

A married woman suing alone, resident out of the jurisdiction, may be ordered to give security: *Reid v. Want*, (1895) 11 W.N. 173. The existence of merely personal assets here is no ground for refusing security: *Kaiapoi Woollen Co. v. Haydn*, (1891) 7 W.N. 147; *Robinson & Sons, Ltd. v. Douglas*, (1890) 1 B.C. 12; but possession of realty or chattels real or other property of a fixed and permanent description would be an answer: *Casey v. Cassin*, (1887) 3 W.N. 85; *Limerick Railway Co. v. Fraser*, 4 Bing. 394; *Redondo v. Chater*, 4 Q.B.D. 457; *re Apollinaris Co.'s Trademarks*, (1891) 1 Ch. 1. A life estate in property in the State is not sufficient: *Orr v. Smith*, (1888) 5 W.N. 16.

**C.L.P. Act,
S. 260.**

Where plaintiff goes to reside permanently abroad after the institution of the suit, security may be ordered: *Massey v. Allen*, 12 C.D. 807.

Foreign company.—A foreign company must give security: *Kaiapoi Woollen Co. v. Haydn*, 7 W.N. 147; *Robinson & Sons, Ltd. v. Douglas* (*supra*); but see *re Apollinaris Co.'s Trademarks* (*supra*); see in Equity, *Brush Electric Co. v. Kingsbury*, (1891) 2 B.C. 6.

Insolvency, bankruptcy, or pauperism.—The fact that plaintiff is an insolvent, a bankrupt or a pauper will not entitle defendant to security: *Ross v. Jacques*, 8 M. & W. 135. But where an uncertificated bankrupt was suing, and the official assignee had signified his intention to claim the damages, if any, security was ordered: *Heiliger v. Marcus*, (1901) 18 W.N. 233; see *Stead v. Williams*, 5 C.B. 528. Where a plaintiff after a verdict for him, but pending a new trial motion, became insolvent, the official assignee was ordered to give security for future costs before appearing: *Hodson v. O'Brien*, (1885) 1 W.N. 101. Where a plaintiff in such a position is really a mere nominal plaintiff, and the action is brought wholly for the benefit of some third party, proceedings will be stayed until security is given, but not if the action is for the plaintiff's own benefit: *Andrews v. Morris*, 7 Dowl. 712; *McSharry v. Railway Commissioners*, (1897) 18 N.S.W.R. 33; 13 W.N. 161; but the mere fact that in such a case the claim the subject of the action has been assigned by way of security to a third person who is finding the money to prosecute the claim is not sufficient ground. *McSharry v. Railway Commissioners* (*supra*); at least where the plaintiff has a substantial interest in the result. Where an order for security is made against the real plaintiff, he cannot be made to pay the costs of the motion, not being a party on the record: *Calder v. Slattery*, (1885) 2 W.N. 38.

Limited or no liability company.—By the Companies Act, 1899, s. 259, where a limited or no liability company is plaintiff if there appears reason to believe that the assets of the company will be insufficient to pay the costs of a successful defendant, the plaintiff company may be ordered to find security, and proceedings stayed meanwhile. The fact that a company is in liquidation is *prima facie* evidence that the assets will be insufficient: *Pure Spirit Co. v. Fowler*, 25 Q.B.D. 235.

Application against a defendant.—Security cannot be required from a defendant, or from a person who though a moving party is really brought into Court to defend himself: *New Pinnacle Group Co. v. Luhrig Co.*, (1900) 21 N.S.W.R. 297; 17 W.N. 206.

Application when made.—The application cannot be made till after appearance. It must usually be made before issue joined: R. 98 (*post*). If made after issue joined it must be made promptly after the circumstances entitling defendant to security have come to his knowledge: *Wainwright v. Bland*, 2 C. M. & R. 740; 4 Dowl. 547.

How made.—The application is usually made on summons to a judge in Chambers: but may be made to the Court on rule nisi: *McSharry v. Railway Commissioners*, (1897) 13 W.N. 127; where a stay will not necessarily be granted pending the rule absolute: *ibid.* No affidavit of merits in the defence is required: *Guinefolland v. Joubert*, (1886) 3 W.N. 32; *Coote v. Howlett*, (1887) 3 W.N. 135.

Form of order.—The order is for a stay of proceedings until security is given: Chitty's Forms, 830.

Bond.—The prothonotary was held right in refusing to approve of the bond of the Commercial Banking Company of Sydney, the bank having no power under its Act to give such a bond: *Buckstone v. Bennett*, (1877) Knox 481.

Second application.—The mere fact that a trial has lasted a considerable time, so that the security at first given has become inadequate, is not sufficient reason for making a further order: *Kugelman v. Norton*, (1900) 16 W.N. 146; nor that a new trial has been ordered: *Cork v. Scottish Imperial Co.*, (1883) T.T.R. 172.

Application by nominal plaintiff.—An alleged partner whose name is being used by co-plaintiffs in an action is entitled to ask for an indemnity by them against costs: *Proudfoot v. Bank of N.Z.*, (1885) 6 N.S.W.R. 170; 2 W.N. 15. See *Imray v. Griffin*, (1889) 10 N.S.W.R. 114; 5 W.N. 112. Where the name of a person is joined as co-plaintiff in an action, and he knows of it and does not repudiate it, he may be supposed to have ratified the attorney's act; and where after two trials such a person applied to set aside judgment and execution against him the application was refused: *Von Meyer v. Borrough of E. St. Leonards*, (1887) 3 W.N. 70.

261. Where two or more persons are defendants in a personal action, any one of them in respect of whom a *nolle prosequi* is entered or who obtains a verdict shall have judgment for and recover his reasonable costs of suit.

Costs to one or more of several defendants.

5 Vic. No. 9, s. 26.

On the section of the English Act 3 & 4 Will. 4, c. 42, s. 32, which is in similar terms (except that a judge could in England certify to deprive a joint defendant of his costs) many cases have been decided. Where several defendants defend jointly and one of them gets a verdict, he will be entitled to an aliquot portion of the joint costs of the defence, unless the taxing officer is satisfied that some smaller portion should be allowed by reason of special circumstances. Thus if there be two defendants he will be entitled to half the costs; if three, to one third: *Griffiths v. Jones*, 4 Dowl. 159; *Starling v. Cosens*, 2 C.M. & R. 445. He may also get separate costs incurred by him applicable to his defence alone: *Griffiths v. Kynaston*, 2 Tyr. 757. If defendants *bona fide* defend by separate attorneys, and one of them gets a verdict he is entitled to the whole of his costs: *Nanny v. Kenrick*, 2 Dowl. 334. Where a verdict is found for the plaintiff on some of the issues against some of the defendants and against the plaintiff on the other issues, the plaintiff is entitled to the balance only of the costs after deduction of all the costs of all the defendants: *Starling v. Cosens*, 2 C.M. & R. 445.

**C.L.P. Act,
S. 261.**

Where there are several defendants who obtain judgment in the action, the plaintiff may pay costs to which of them he pleases, and when they fail each defendant is liable for the whole costs, but if after satisfaction from any one, the plaintiff takes out execution against another, such defendant may apply to the Court for a stay: *Wilson v. Foote*, Bull. N.P. 335.

Defendants *bona fide* severing in their defence and obtaining verdicts are each entitled to their costs; but otherwise if the severance is not *bona fide*: *Gambrell v. Earl of Falmouth*, 5 A. & E. 403.

262. Where a *nolle prosequi* is entered on any count or as to part of a declaration, the defendant shall have judgment for and recover costs in that behalf. *Nolle prosequi.* 5 Vic. No. 0. s. 26.

And if there are two counts on distinct causes of action, and the defendant lets judgment go by default as to one and obtains a verdict on the other, the plaintiff is entitled to costs on the former, the defendant on the latter: *Day v. Hanks*, 3 T. R. 654; *Anon.* 8 T.R. 467.

And see s. 265, *infra*.

263. In all writs of *scire facias* the plaintiff shall recover his costs as well upon a judgment by default as on a judgment after plea or demurrer. *Scire facias.* *Ibid.*

As to *sci. fa.*, see s. 148, *ante*.

264. Where judgment is given on a demurrer in any action whatever, the party in whose favour such judgment is given shall have judgment to recover his costs. *Demurrer.* *Ibid.*

As to demurrer, see s. 100, *ante*.

265. The costs of any issue either of fact or law shall follow the finding or judgment upon such issue, and be adjudged to the successful party whatever may be the result of the other issue or issues. *Distribution of costs.* 17 Vic. No. 21, s. 75.

See R. 424, *post*.

If there are several issues and one is found for the plaintiff, and the other for the defendant, if that found for the plaintiff entitle him to recover his debt or damages, or any part of them, he will be entitled to the *postea* and to the general costs of the cause: Chitty's Archbold, 499. As to costs of abortive issues on arrest of judgment, or judgment *non obstante veredicto*, see s. 164, *ante*.

But the defendant will be entitled to the same if the defence raised upon the issue found for the defendant furnishes a defence to the whole action. Thus in an action for libel if there is a plea of not guilty and pleas of justification, and a verdict is found for the defendant on the general issue, and for the plaintiff on the special plea, the defendant is entitled to the general costs of the cause. So will he be entitled to them if there be but one plea upon which issue is joined, if the plea raises divisible and distinct issues, one of which, substantially a defence to the whole action is found for the defendant: Chitty's Archbold, 499, 500, and cases cited: *Hart*

C.L.P. Act, *v. Cutbush*, 2 Dowl. 456; *Frankum v. Lord Falmouth*, 4 Dowl. 65; *Bird v. Higginson*, 5 A. & E. 83; *Spencer v. Hamerton*, 4 A. & E. 413; *Newton v. Holford*, 14 L.J. C.P. 145; 1 C.B. 141; *Knight v. Woore*, 3 Bing. N.C. 534; 5 Dowl. 487.

Where there are several issues the party who is entitled to the general costs of the cause is (except where no material issue in fact is found for him: *R. 424, post*) entitled to all the costs with the exception of the costs of such parts of the pleadings, briefs and counsel's fees (*Haslewood v. Back*, 9 M. & W. 1; *Hart v. Cutbush*, 2 Dowl. 456) and of such of the witnesses and other expenses (*Eades v. Everett*, 3 Dowl. 687; *Richards v. Cohen*, 1 Dowl. 533) as are applicable only to the issue or issues on which he has failed, which costs will have to be deducted from his costs. And it is further to be observed that such party will be entitled to the costs of all witnesses whose evidence related to the issues on which he has succeeded although their evidence also related to the issues on which he has failed; but that the opposite party will only be entitled to the cost of such witnesses whose evidence related exclusively to the issues on which he has succeeded: *Cowlshaw v. Macleod*, (1899) 15 W.N. 193; *Freeman v. Rosher*, 6 D. & L. 517; 18 L.J.Q.B. 105; *Clothier v. Gunn*, 13 C.B. 220; 22 L.J.C.P. 98; *Jewell v. Parr*, 25 L.J.C.P. 179. In general the question as to whether particular costs are referable to one issue or another is a question of fact for the decision of the taxing officer and the Court will not interfere with it: *Doe d. Smith v. Webber*, 2 A. & E. 448; *Pilgrim v. Southampton, &c., Railway Co.*, 8 C.B. 25; *Chitty's Archbold*, 502, 503.

Cases in the New South Wales Courts.—The following cases illustrating the above statements of the law on this subject have been decided in the New South Wales Courts: *Wilson v. McBean*, (1867) 7 S.C.R. 109, an action for illegally impounding and not feeding cattle, and for trespass for taking the cattle; verdict for plaintiff on question of not feeding only; and on issue raised on one replication verdict generally for the defendant, but as to parts of this replication denied by special rejoinders issues found for the plaintiff. On review the prothonotary was directed to tax costs on these issues for the plaintiff. "The guide for the prothonotary on taxation is a simple one, namely that he should tax on each issue the costs of the party succeeding on that issue; the difficulty is in the application of this rule. The defendant separately by distinct rejoinders took issue on three of four facts, and each of these was found for the plaintiffs. I am of opinion that whatever were costs fairly applicable to these three issues should be allowed to the plaintiff. In *Reynolds v. Harris*, 3 C.B.N.S. 267, where the plea was divided, the Court held that the defendant was entitled to the costs of that part of the plea which was found to be true; but the plaintiff did not get the costs of any part of that plea." In *Kearney v. Bryan*, (1871) 10 S.C.R. 167, *Stephen, C.J.*, said, "The question of divisible or not divisible issues, and the right of the litigant who succeeds on part of such an issue (but who has failed on other parts, and generally in the action) to get costs as to the part on which he has succeeded, are of no small embarrassment, and the subject of various irreconcilable decisions, as well as opposing views by different text writers." But the judgment goes on to recognise certain points as clearly decided—

that with respect to findings on distinct and separate issues the losing party is to have his costs of the issues on which he has succeeded:

that the findings must appear on the record by distinct findings of the jury or by the *postea*, original or amended:

that the same rule applies to the costs of different parts of a divisible issue.

"Looking at the decisions in *Roulledge v. Abbott*, 8 A. & E. 582; *Sharland v. Loaring*, 1 Ex. 375; (where however there were separate closes named although in one count), *Williams v. The G.W. Railway*, 8 M. & W. 856; *Cox v. Thomasson*, 2 Cr. & J. 498 (a case as to separate counts met by one plea); *Welby v. Brown*, 1 Ex. 770; (where a demand for work was reduced in amount only); *Prudhomme v. Fraser*, 2 A. & E. 645; *Traherne v. Gardner*, 8 E. & B. 178, 182; and *Paterson v. Harris*, 31 L.J.Q.B. 279;—especially the observations of Mr. Justice Crompton in the last cited case—I conceive the rule to be established, that wherever there are causes of action included in one count, which the defendant might at his option have separated in pleading, either by denying part and confessing but avoiding another part, or by setting up in any way separate defences to different portions of the claim, then the issue though in form one only, is equally divisible by the verdict. But the application of this rule will still in particular instances be matter of nice discrimination, and may occasionally be of much difficulty."

"Where the issue itself cannot be or has not been divided, but where the plaintiff has not proved a cause of action to the extent asserted by him, if he has called witnesses to support the more extensive demand, he cannot get costs in respect of

those witnesses or of that or portion of his claim; but the defendant though he may have called witnesses to meet and disprove that part, is nevertheless not entitled to the costs of his partial success." **C.L.P. Act, s. 265.**

In the case of *Little v. Sandeman*, (1880) 1 N.S.W.R. 263; Where the plaintiff sued for several horses in a count in trover, specifying them in his particulars, and recovered damages only for one, it was held that the defendant was entitled to have the verdict entered for him in respect of the other horses; and the *postea* was amended accordingly by the Full Court, the trial having taken place on circuit before an acting judge whose commission was at an end. In the case of *Ollive v. The Borough of Waterloo*, (1882) 3 N.S.W.R. 26, plaintiff sued in a first count for negligently altering a street whereby damage accrued to his land, and in a second count for trespass, verdict for one farthing on the second count and certificate refused. The Court held on motion to review taxation that the defendants were not entitled to the general costs of the action (and that their costs should be taxed as between party and party as s. 9 of the Act 22 Vic. No. 12 (see General Legal Procedure Act 1902, s. 6, *post*) does not extend to a case like this). It was further held that the defendants should be allowed the costs of such parts of the pleadings, briefs, counsel's fees, witnesses and other expenses as were applicable exclusively to the issue on which they succeeded; that in effect this was the judgment of Mr. Justice Patteson in *Fasakerly v. Rogerson*, 1 L.M. & P. 747; the word exclusively should be read substantially."

In *O'Rourke v. The Commissioner for Railways*, (1888) 9 N.S.W.R. 357; 5 W.N. 16; on a claim for £100,000, on common money counts, the matter being referred to arbitration, the arbitrators found a verdict for the plaintiff for £20,000 odd; it was held by the Court here that the defendant having succeeded on a large portion of the claim should have his costs of the items on which he had succeeded taxed in order to set them off against plaintiff's costs; and that the prothonotary might inquire of the arbitrators to find out on which items defendants had succeeded. But on appeal to the Privy Council (11 N.S.W.R. 459) this decision was reversed on the ground that by the express terms of the reference the parties had agreed that the award should be for a sum certain and that costs should follow the event.

In *Brown v. Dibbs*, (1874) 12 S.C.R. 339, action for coals sold and delivered, claiming £4000 odd, plea cross action only, verdict for plaintiffs for £2034 6s., it was held by the Court that the plaintiffs should have the general costs of the action, and the costs of proving his claim, and the costs of any witnesses whose evidence was efficacious in cutting down the defendant's claim under his cross action; and the *postea* being amended to show as the fact was that a verdict had been found for the defendant on the plea of cross action with damages £2290, the costs of defendant under his plea of cross action should be deducted when taxed from plaintiff's costs; and see *Dubbo Refrigerating Co. v. Rutherford*, (1898) 14 W.N. 180. But in *Bogan v. Lyons*, (1890) 6 W.N. 169, defendant was not allowed his costs on his plea of set off, the *postea* not showing that he had obtained a verdict on the plea and there being nothing to show that such was the case in order to enable the *postea* to be amended.

Where the plaintiff succeeds but does not get his costs for any reason (as by not getting a certificate under the District Courts Act) defendant is nevertheless entitled to the costs of the issues found in his favor: *Ollive v. The Borough of Waterloo*, 3 N.S.W.R. 26 (*supra*).

If the unsuccessful party's costs exceed those of the successful party, he will have judgment for the excess: *Twigg v. Potts*, 4 Dowl. 266; *Milner v. Graham*, 2 Dowl. 422; and see *Somerville v. Brennan*, (1902) 18 W.N. 287.

"Costs in the cause" may in certain cases be distributive. In *Brace v. Kempson*, (1895) 11 W.N. 147, plaintiff sued in three counts, defendant paying money into court as to one count and pleading to the others. A discovery order was then obtained by plaintiff, costs to be costs in the cause; afterwards plaintiff accepted the money paid in and entered a *nolle prosequi* as to the rest of the declaration: held, that defendants were entitled to the discovery costs having succeeded on the issues on which the discovery was obtained. So of costs of commissions: *Dubbo Refrigerating Co. v. Rutherford*, (1898) 14 W.N. 180.

Set off of costs.—The costs of demurrer and of all interlocutory proceedings are the subject of set off in the final adjustment of the costs: *Broughton v. Vincent*, (1883) 4 N.S.W.R. 59; R. 425, *post*; "interlocutory proceedings" including proceedings after judgment: *Adams v. Young*, (1899) 20 N.S.W.R. 305; 16 W.N. 58; but costs ordered to be paid by order of the Privy Council stand on a different footing and must be paid independent of set off: *Adams v. Young*, (1899) 20 N.S.W.R. 169; 15 W.N. 269. Though costs of an Equity suit cannot be set off against costs of a common law action between the same parties to the prejudice of the solicitors lien: *Want v. Moss*, (1892) 13 N.S.W.R. 96; 9 W.N. 15; R. 425, *post*.

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As to set off of costs of abortive issues on arrest of judgment or judgment *non obstante veredicto*: see s. 164.

Costs of two trials on different matters properly brought between the same parties are not to be set off to the prejudice of the attorney's lien: *Cohn v. Rowe*, (1883) T.T.R. 182. Such a lien may be waived: *Wilson v. Smith*, (1880) 1 N.S.W.R. 310.

Costs of two rules for prohibition substantially the same matter ordered to be set off: *Ex parte Hartley*, (1890) 6 W.N. 160.

Where plaintiff had a verdict on one count for £25, but got no certificate, and defendant's costs on another count on which he succeeded came to £37, it was held that defendant could set off these costs against the verdict: *Sommerville v. Brennan*, (1902) 18 W.N. 287.

Scales of costs:
20 Vic. No. 8,
s. 3.

266. The Judges may make rules establishing three separate scales of costs in actions, having regard severally to the amount sued for or the value of the matter sought to be recovered. The lowest scale shall extend to all cases not exceeding fifty pounds, the second scale to all cases above fifty and not exceeding one hundred pounds, and the highest scale to all other cases.

Rules.—Rules have been passed establishing three scales: see RR. 408, 409, and scales, *post*.

Amount sued for or value of the matter brought to be recovered.—In *Clune v. Smythe*, (1899) 15 W.N. 229, the prothonotary held that the meaning of the words "amount sued for" differs according as the plaintiff or the defendant is the successful party; that they mean the amount recovered when the plaintiff is successful and the amount endorsed on the writ or claimed in the declaration when the defendant is successful: citing *Cross v. Collins*, 5 Bing. N.C. 194; *Woodhams v. Newman*, 7 C.B. 654; *Emery v. Binns*, 7 Moo. P.C. 195; *Ex parte Goebel*, 2 S.C.R. 82; *Dowling v. Burt*, (1898) 19 N.S.W.R. 55; 14 W.N. 177; *Kauri Timber Co. v. The Woosung*, (1897) 14 W.N. 38. He further held that applying the same construction to the words "value of the matter sought to be recovered" they must also be construed differently according as the plaintiff or defendant is successful. In the former case the verdict shows what it is that the plaintiff seeks to recover, and his costs are to be taxed according to the value of what he actually recovers; in the latter case the value to be ascertained is the value to the defendant of that which is claimed by the writ from him. Accordingly he held that (the case being ejection) the value of the matter sought to be recovered must be limited to the value of defendant's interest in the property, the defendant having succeeded. On appeal, *Cohen, J.*, held that the prothonotary was right.

Where a judge grants a certificate for costs, he has no power to direct which scale the costs shall be taxed on: *Dowling v. Burt*, (1898) 19 N.S.W.R. 55; 14 W.N. 177; overruling a practice to the contrary as in *Vickery v. Jenner*, (1897) 13 W.N. 119.

Rules establishing three scales of costs held retrospective: *Bowman v. Railway Commissioners*, (1899) 15 W.N. 237.

What costs are allowed between party and party.—"A party may charge against another whatever costs have been necessarily incurred for the establishment of his case. Any costs beyond for the more convenient conduct and understanding of the case are not allowed—these are incurred for luxuries": per *Stephen, J.*, *O'Rourke v. Commissioner for Railways*, (1893) 10 W.N. 49. See generally *Chitty's Archbold*, 510 as to what are costs necessarily incurred.

Various specific items have been considered by the judges here from time to time, but space will not allow them to be more than mentioned.

Discontinuance.—*Informal notice of trial.*—Where a case was set down for trial at circuit, but no formal notice of trial was given, and afterwards plaintiff discontinued; plaintiff's attorney however, had informed defendant's attorney in conversation that the case had been set down: held, under the special circumstances that instructions for brief drawing and copy should be allowed to defendant: *Shepherd v. St. Baker*, (1881) 2 N.S.W.R. 129.

Arrest of defendant.—Costs of an arrest allowed: *Solomon v. Johnston*, (1867) 6 S.C.R. 255.

Injunction.—Costs of an *ex parte* injunction allowed as costs in the cause: *Carter v. Cox*, (1880) 1 N.S.W.R. 95.

Instructions for brief taxed down from £5000 to £550; *held*, a matter in the prothonotary's discretion: *O'Rourke v. Commissioners for Railways*, (1893) 10 W.N. 49. **C.L.P. Act, S. 266.**

Preparing for trial.—Payments made to witnesses for qualifying themselves to give evidence: *Lucas v. Lackey*, (1882) 4 N.S.W.R. 28; (but see now Scales of costs, 4th Sch. to Rules, *post*; *Bowman v. Railway Commissioners*, (1899) 15 W.N. 237), or for conferences of witnesses with solicitor and counsel: *Deane v. Railway Commissioners*, (1897) 18 N.S.W.R. 294; 14 W.N. 26; are not allowed: and see *Rigney v. Dangar*, (1862) 2 S.C.R. 9.

Witnesses.—A witness was subpoenaed and present at one sittings when the case went over and was not present at the trial at the next sittings: *held*, his expenses should be allowed: *McKellar v. Reid*, (1883) T.T.R. 183.

Witness.—Plaintiff, a ship's captain, in a wrongful dismissal action, allowed maintenance costs for the period he was waiting here for the trial: *Harvey v. Ewan*, (1881) 2 N.S.W.R. 267.

Witness.—Plaintiff may have travelling and other expenses though he could have been examined on commission: *Markham v. Abbott*, (1889) 10 N.S.W.R. 1; 5 W.N. 95.

Witness.—The prothonotary should act on no fixed rule in determining what was a reasonable allowance for coming, going, and attendance of witnesses, but should take each case into consideration having regard to the character of each witness' evidence and the probability of his being re-called: *O'Rourke v. Railway Commissioners* (1893) 10 W.N. 49; 17 N.S.W.R. 182; 13 W.N. 36; P.C.

Witnesses.—Payments to town witnesses other than medical men and solicitors were not allowed: *Lucas v. Lackey*, (1882) 4 N.S.W.R. 28; but see now Scales of Costs, 4th Sch. to Rules, *post*.

Medical witnesses.—Where before trial medical men on behalf of plaintiff were present at an examination of plaintiff by defendant's medical men (under the terms of an interlocutory order) *held*, that fees paid them by the plaintiff should be allowed, in the prothonotary's discretion as to the amount: *Smithyman v. Whitney*, (1881) T.T.R. 45.

Medical witness.—Allowed though a town witness: *Carter v. Cox*, (1880) 1 N.S.W.R. 94. One guinea a day is all that is allowed a medical witness as between party and party: *Deane v. Railway Commissioners*, (1897) 18 N.S.W.R. 295; 14 W.N. 26.

See now Scales of costs, 4th Sch. to Rules, *post*.

Costs of production of documents from a public office allowed although no notice to admit was given, the production of the documents themselves being necessary: *Rigney v. Dangar*, (1862) 2 S.C.R. 9.

Plans and surveys.—Amount allowed not interfered with, as being in the discretion of the prothonotary: *Rigney v. Dangar*, (1862) 2 S.C.R. 9.

Copies of plans, ibid.—Copies sent to London for use on a commission, *ibid*; see *Lucas v. Lackey*, 4 N.S.W.R. 28; as paid to witnesses for qualifying themselves to give evidence.

Surveys.—Costs disallowed: *Walker v. Buchanan*, (1864) 3 S.C.R. 126; and *Hay v. Cameron*, *in nota, ibid*; *Lucas v. Lackey*, (1882) 4 N.S.W.R. 28; see *Mal-lady v. Bradley*, Steph. Supp. 109. But see now Scales of costs, 4th Sch. to Rules, *post*.

Copies of measurements and quantities, and of diaries kept by defendant's servants: *held*, in the discretion of the prothonotary as to whether they were necessary or not: *O'Rourke v. Commissioners for Railways*, (1893) 10 W.N. 49.

Copies of documents in one counsel's brief not necessarily allowed in second counsel's brief: *ibid*.

Copies of certain of defendant's exhibits not necessarily allowed in plaintiff's costs, though made for the use of plaintiff's counsel: *ibid*.

Copies of detailed particulars of claim for use of judge and jury disallowed: *ibid*.

But other copies supplied by request of defendants allowed: *ibid*.

Admissions.—Attendance to settle allowed: *Rigney v. Dangar*, (1862) 2 S.C.R. 9.

Separate actions of the same character by a plaintiff against five defendants: *held*, that plaintiff's attorney was entitled to charge each defendant with drawing and copy brief: *Tucker v. Graham*, (1869) 8 S.C.R. 341.

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Separate actions by five plaintiffs against one defendant; one amount allowed to defendant for instructions for brief divided against the five plaintiffs: Brown v. Walker, (1885) 6 N.S.W.R. 273; 2 W.N. 37.

Other actions of a similar character to the one in question had been brought by other persons: held that the prothonotary was in error in holding that the solicitor for the plaintiff should have been guided in the conduct of the case by what had taken place in the other actions: Deane v. Railway Commissioners, (1896) 17 N.S.W.R. 428; 13 W.N. 97.

Refreshers to counsel should be allowed: Rigney v. Dangar, (1862) 2 S.C.R. 9. To senior counsel even when not in court: Herbert v. Blunt, (1881) 2 N.S.W.R. 273; but only if paid beforehand: Clines v. Cooper, (1901) 18 W.N. 104 (Barton, M.). The amount is in the discretion of the prothonotary: Mackay v. Commissioner for Railways, (1884) 1 W.N. 15. Refreshers disallowed where counsel attended merely for the purpose of adjournment, it being understood that the case could not come on on that day: O'Rourke v. Commissioners for Railways, (1893) 10 W.N. 49.

Counsel's fee if not paid at the time of taxation is properly disallowed: Re J. R. Edwards, (1884) 1 W.N. 41.

Retainer fees reduced: O'Rourke v. Commissioners for Railways, (1893) 10 W.N. 49.

Counsel's visit to the locus in quo, costs not allowed: O'Rourke v. Commissioners for Railways, (1893) 10 W.N. 49.

Third counsel.—Allowed in a heavy action: Rigney v. Dangar, (1862) 2 S.C.R. 9.

Two Queen's counsel.—Fees of a junior allowed: Sandeman v. Hinton, (1880) 1 N.S.W.R. 50.

Three counsel allowed: Goode v. Onslow, (1881) 2 N.S.W.R. 278; disallowed: Deane v. Railway Commissioners, 18 N.S.W.R. 294; 14 W.N. 26.

Second counsel.—Review ordered where the prothonotary had disallowed a second counsel on a claim of £138,000: North Illawarra Coal Co. v. Commissioners for Railways, (1886) 7 N.S.W.R. 346; 3 W.N. 31. See also Wilson v. Lomax, (1887) 8 N.S.W.R. 94; 3 W.N. 111; Mason v. Logan, (1890) 6 W.N. 118.

The fact that one counsel (who could not attend to the case) had been paid a fee which had been allowed is not a reason for reducing the fee of counsel who did attend: O'Rourke v. Commissioners for Railways, (1893) 10 W.N. 49.

Counsel's fee.—Amount: Deane v. Railway Commissioners (supra).

Conference on plea.—Fee to counsel on conference on a plea allowed: Turner v. Lance, (1862) 2 S.C.R. 159.

Consultations.—Number and fees allowed in the discretion of the prothonotary: O'Rourke v. Commissioners for Railways, (1893) 10 W.N. 49; 17 N.S.W.R. 182; 13 W.N. 36 (P.C.).

Shorthand notes of the evidence: where notes were taken by agreement, each side paying half, held that such expense should be allowed: O'Rourke v. Commissioners for Railways (supra).

Attorneys attendance at trial: expenses of a country attorney attending trial in Sydney disallowed: Power v. McKellar, (1883) T.T.R. 183; Bombala Farmers Co. v. Victoria Insurance Co. (1887) 8 N.S.W.R. 85; 3 W.N. 103.

Attorney conducting arbitration allowed for instructions, &c.: Thorpe v. Mills, (1891) 7 W.N. 74.

Attorney's attendance: amount charged in the discretion of the prothonotary: O'Rourke v. Commissioners for Railways, (1893) 10 W.N. 49.

"All costs": On a settlement under which defendant was to pay "all costs" plaintiff was entitled to attorney and client costs: Crawford v. Commissioner for Railways, (1881) T.T.R. 45.

Taxation.—See R. 411 (post).

Review of taxation.—See RR. 417, et seq. (post).

Costs when not more than £30 recovered:

22 Vic. No. 18, ss. 100, 101.

267. (1) If the plaintiff in any action recovers by judgment by default, verdict or otherwise, a sum not exceeding thirty pounds, then unless a Judge certifies—

(a) that the cause of action was one for which a plaintiff could not have been tried in any District Court without the defendant's consent; or

- (b) that any officer of the District Court was a party (where **C.L.P. Act, S. 267.** the action is not in respect of any claim to goods and chattels taken in execution of the process of such District Court or the proceeds in virtue thereof); or
- (c) that it appears to him that there was a sufficient reason for bringing or trying the said action in the Court, the plaintiff shall have judgment to recover such sum only and no costs; and it shall not be necessary to enter any suggestion on the record to deprive him of costs.

(2) If a Judge certifies as aforesaid, the plaintiff shall have the same judgment to recover his costs as he would have had if this section had not been passed.

Compare the English Statutes 13 & 14 Vic., c. 61, ss. 11, 12, Chitty's Archbold, 476.

On judgment by default.—On judgment by default a judge may grant a certificate *ex parte*, subject to its being set aside on summons, *Friend v. Dykes*, (1889) 5 W.N. 80; but as to assessing the costs, see *Dowling v. Burt*, 14 W.N. 177.

Verdict or otherwise.—This includes payment into court accepted: *Allen v. Donovan*, (1897) 14 W.N. 79; *Briscoe v. Barrett*, (1890) 6 W.N. 142. But where after writ and appearance money was paid and accepted by plaintiff no certificate could be granted, nothing appearing on the record to show that any sum was recovered: *Meyers v. Weisener*, (1896) 12 W.N. 153.

Not exceeding £30.—Where money has been paid in, and the amount paid in together with the amount of the verdict exceeds £30, no certificate is required: *Barclay v. Manby*, (1862) 1 S.C.R. 346.

Detinue.—Where a plaintiff recovered £25 for breach of contract and £279 in detinue as the value of certain deeds, and 1/- for detention, and the deeds were returned, it was held that the verdict in the events which had occurred was for less than £30, and a certificate was necessary (which was refused): *Miller v. Hall*, (1887) 8 N.S.W.R. 469.

A judge certifies.—The application is usually made to the judge presiding at the trial and upon verdict. If not made then a summons must be taken out.

No appeal lies to the court from the judge's decision: *Siddons v. N.S.W. Shale & Oil Co.*, (1874) 12 S.C.R. 364. But the judge may apparently refer the question to the court: *Miller v. Hall*, (1887) 8 N.S.W.R. 469. A judge refusing his certificate may reconsider his decision: *Lane v. Mayor of Goulburn*, (1871) 10 S.C.R. 108.

On judgment by default (*v. supra*) or where money has been paid into court and accepted: *Briscoe v. Barrett*, (1890) 6 W.N. 142; *Allan v. Donovan*, (1897) 14 W.N. 79; a certificate may be obtained *ex parte*, subject to being set aside on summons by defendant for that purpose: *Ibbotson v. Hudson*, (1888) 4 W.N. 154; *Allan v. Donovan (supra)*. Where defendant upon being served with a writ claiming less than £30, paid the claim to the plaintiff but without any costs, plaintiff's attorney was held entitled to sign judgment for the costs and to obtain an *ex parte* certificate for costs: *Booth & Co. v. Neale*, (1892) 8 W.N. 86.

Cause of action not triable in a District Court.—Such a case is *e.g.*, where title to land is *bona fide* in question, as in *Borough of Granville v. Armstrong*, (1897) 14 W.N. 63. Although an injunction is claimed and obtained, that fact alone is not enough to entitle the plaintiff to a certificate: *Allan v. Donovan*, 14 W.N. 79; following *St. John's College v. Pierrepont*, 61 L.J.Q.B. 19, and not an expression of opinion in *Laxton v. Waterhouse*, (1891) 7 W.N. 98; but see *Keates v. Woodward*, (1902) 1 K.B. 532, overruling *St. John's College v. Pierrepont*.

Sufficient cause.—In *Minehan v. Clarke*, (1870) 9 S.C.R. 227, the judgment of Stephen, C.J., summed up in the head note is as follows: "The ordinary cases in which it may be held (under this section) that a sufficient reason existed for bringing the action in this court so as to entitle the plaintiff to his costs, although the amount recovered be less than £30, are: 1. Where the matter in contest involves difficult questions of law or complicated questions of fact. 2. Where the plaintiff although from accidental circumstances establishing a cause of action comparatively trivial may justly have expected and been in fact entitled to a much larger sum than £30. 3. Where the particular position of the parties or one of them justifies the plaintiff in bringing his case before the superior tribunal. 4. Where the expense of suing in the District Court, having regard to the residence of witnesses or the like would have been greater than in the Supreme Court."

**C.L.P. Act,
S. 267.**

Certificates have been granted in the following cases :—

Stewart v. Caples, (1870) 9 S.C.R. 232, on the ground that important questions of law and fact were involved ; also that plaintiff might reasonably have expected a larger verdict.

Vickery v. Jenner, (1897) 13 W.N. 119, difficult question of law involved.

Lane v. Mayor of Goulburn, (1871) 10 S.C.R. 108, probability of larger damages if a certain letter had been produced.

Fuller v. Weston, (1870) 9 S.C.R. 268, action for libel charging partiality in a magistrate.

Lane v. Mayor of Goulburn, (1871) 10 S.C.R. 108, where publication of certain matters leading up to the case might have affected the minds of the jury in a country town where defendant resided.

Nicoll v. Baker, (1896) 13 W.N. 13 ; plaintiff a magistrate and ex-member of Parliament ; and on other grounds,—remote place of publication of defendant's newspaper.

Luker v. Hagarty, (1898) 14 W.N. 84, action for a libel accusing plaintiff, a medical man, of negligence.

Slate v. Bromilow, (1892) 9 W.N. 29, where a Sydney dentist sued an Orange resident, certificate granted on the ground that the expense of suing in the Orange District Court would have been greater than in the Supreme Court in Sydney.

In *Major v. Bullock*, (1880) 1 N.S.W.R. 139, an action for assault, verdict $\frac{1}{4}$ d., a certificate had been granted—ground not stated.

In *Lackey v. Collets*, (1886) 3 W.N. 63, defendant having before action (of trespass) set up a claim to a right of way, plaintiff was held justified in bringing an action in the Supreme Court, as not knowing what defence might be set up.

In *Allan v. Donovan*, (1897) 14 W.N. 79, in an action of trespass plaintiffs accepted 1/- paid into court, a certificate obtained *ex parte* was upheld on the ground that defendant's trespasses were repeated and wilful.

A certificate will always be granted in actions on bills and promissory notes : *Mont de Piete Co. v. Bennett*, (1890) 7 W.N. 45. And in actions to recover a liquidated demand where the writ is specially endorsed, because the plaintiff is entitled to the advantage of having the pleas verified : *Aylmer v. Cox*, (1902) 19 W.N. 228 ; *Kerven v. Eason*, (1902) 19 W.N. 305 ; but where the writ is improperly specially indorsed, certificate will not necessarily be granted : *Campbell v. Kenny*, (1903) 20 W.N. 15.

Certificate was refused in—*Minehan v. Clarke*, (1870) 9 S.C.R. 227 (malicious prosecution, verdict 40/-) ; *Siddons v. N.S.W. Shale Co.*, (1874) 12 S.C.R. 364 (breach of agreement, $\frac{1}{4}$ d. damages) ; *Summerhayes v. Reinhard*, (1886) 3 W.N. 34 (verdict for £5, no reasonable expectation of verdict over £30) ; *Wyse v. Mun Hoy*, (1885) 1 W.N. 108 ; *Ingham v. McKenzie*, (1887) 3 W.N. 108 (small sums paid into court and accepted) ; *Head v. White*, (1887) 4 W.N. 35 ; *Rochester v. Municipal Council of Sydney*, (1902) 19 W.N. 158 (action against the council for negligent repair of their footways).

PART XXVI.

RULES AND FORMS.

General rules
may be made
by the Judges.

4 Vic. No. 22,
s. 23.

12 Vic. No. 1,
s. 10.

17 Vic. No. 21,
s. 174.

20 Vic. No. 31,
s. 61.

268. (1) The Judges may make all such general rules and orders—

- (a) for the effectual execution of this Act and of the intention and object hereof ; and
- (b) for fixing costs to be allowed for and in respect of the matters herein contained and the performance thereof, and
- (c) for apportioning the costs of issues, and

(d) for altering the number of days by this Act limited for **C.L.P. Act,**
the return of any writ, or for the doing of anything by **S. 268.**
this Act prescribed or authorised to be done, and substituting other days for the same,
as in their judgment shall be necessary or proper.

(2) The Judges may also from time to time exercise all the powers and authority given to the Judges at Westminster or any of them by the Imperial Act thirteenth and fourteenth Victoria, chapter sixteen, with respect to any matter herein contained relative to practice or pleading, anything in this Act to the contrary notwithstanding.

(3) The provisions of the said Imperial Act as to the rules, orders, or regulations made in pursuance thereof, shall be held applicable to any rules, orders, or regulations made in pursuance of this section, except that it shall not be necessary to lay any such rule before either house of the Imperial Parliament at any time or before the Colonial Parliament at any time before the commencement of the operation of any such rule.

(4) Nothing herein contained shall be construed to restrain the authority or limit the jurisdiction of the Court or Judges thereof to make rules or orders or otherwise to regulate and dispose of the business therein.

Altering the number of days.—See *Lasarus v. Stutchbury*, (1886) 2 W.N. 114; on appeal 7 N.S.W.R. 328; 3 W.N. 23.

The imperial act thirteenth and fourteenth Victoria, chapter sixteen.—This Act enacted as follows:—That the judges of the said superior Courts (of common law at Westminster), or any eight or more of them, of whom the chiefs of each of the said Courts shall be three, shall and may, by any rule or order to be from time to time by them made in term or vacation at any time within five years after the passing of this Act, make such alterations in the mode of pleading in the said courts, and in the mode of entering and transcribing pleadings, judgments, and other proceedings in actions at law, and in the time and manner of objecting to errors in pleadings and other proceedings, and in the mode of verifying pleas and obtaining final judgment without trial in certain cases, and such regulations as to the payment of costs and otherwise for carrying into effect the said alterations, as to them may seem expedient; and all such rules orders or regulations shall be laid before both Houses of Parliament, if Parliament be then sitting, immediately upon the making of the same or if Parliament be not sitting then within five days after the next meeting thereof; and no such rule order or regulation shall have effect until three months after the same shall have been so laid before both Houses of Parliament; and any rule order or regulation so made shall from and after such time aforesaid be binding and obligatory on the said courts and all other courts of common law, and on all courts of error into which the judgments of the said courts or any of them shall be carried by any writ of error, and be of the like force and effect as if the provisions contained therein had been expressly enacted by Parliament: Provided always that it shall be lawful for the Queen's most Excellent Majesty by any proclamation inserted in the London Gazette, or for either of the Houses of Parliament by any resolution passed at any time within three months next after such rules orders and regulations shall have been laid before Parliament, to suspend the whole or any part of such rules orders or regulations, and in such cases the whole or such part thereof as shall be so suspended shall not be binding and obligatory on the said courts or on any other court of common law or court of error.

This a very important power conferred on the judges, in however awkward a manner, because the Imperial Act confers on rules made by judges the force of law as though they had been enacted by Parliament.

See *Newington v. Levy*, L.R. 5 C.P. 607.

269. (1) This section shall apply only to the provisions contained in sections thirty-two, thirty-three, thirty-nine, forty-one, in sections forty-four to forty-eight, both inclusive, and in Part XX of this Act.

Rules under provisions relating to absent defendants and joint contractors

4 Vic. No. 6,

s. 25.

**C.L.P. Act,
S. 269.**

(2) Where the said provisions are insufficient or where no provision is made, the Court may for the purpose of facilitating or more effectually carrying into execution any of the objects of the said provisions, make such rules and orders touching—

- (a) any of the matters intended to have been thereby provided for ; and
 - (b) the manner of proceeding before or applying to the Court or a Judge ; and
 - (c) the execution of writs and orders ; and
 - (d) the allowance and taxation of costs,
- as to the Court seems expedient.

(3) Such rules and orders may be either general or applicable to a particular case only, and may be made either upon an application made in a summary way, by or on behalf of any person interested in any matter intended to have been so provided for, or without such application.

(4) All rules and orders so made shall be of the same force and effect as if they had been inserted in this Act.

New forms of writs and other proceedings.
17 Vic. No. 21, s. 175.

270. (1) Such new or altered writs and forms of proceedings may be issued, entered, and taken as may by the Judges be deemed necessary or expedient for giving effect to the provisions hereinbefore contained, and in such forms as the Judges from time to time think fit to order.

(2) Such writs and proceedings shall be acted upon and enforced in such and the same manner as writs and proceedings of the Court before the commencement of the Common Law Procedure Act of 1853 were acted upon and enforced, or as near thereto as the circumstances of the case will admit.

(3) Any existing writ or proceeding, the form of which is in any manner altered in pursuance of this Act, shall nevertheless be of the same force and virtue as if no alteration had been made therein, except so far as the effect thereof may be varied by this Act.

SCHEDULES.

C.L.P. Act,
Sch. 1.

FIRST SCHEDULE.

Reference to Act.	Title or short title.	Extent of Repeal.
4 Vic. No. 6	An Act to consolidate and amend the laws relating to actions against persons absent from the Colony and against persons sued as joint contractors.	The whole, except so much of section 25 as relates to feigned issues.
4 Vic. No. 22	An Act to provide for the more effectual administration of justice in New South Wales and its dependencies.	Section 15, except so far as it relates to criminal proceedings, and section 26.
5 Vic. No. 9	An Act for the further amendment of the law, and for the better advancement of justice.	Sections 17, 20, 22, 23, 24, 26, 38, and so much of section 42 as relates to new trials.
10 Vic. No. 10	An Act to amend the law respecting the recovery of small debts in all parts of the Colony.	Sections 15, 16, and 17.
12 Vic. No. 1	An Act to simplify and alter the law in some respects.	All the unrepealed sections, except sections 5 and 8.
15 Vic. No. 3	An Act to amend in some respects the Act passed to consolidate the laws relating to juries.	Sections 9, 10, and 11.
16 Vic. No. 14	An Act to amend the law of Evidence . .	Section 6.
17 Vic. No. 21	The Common Law Procedure Act of 1853	The whole, except section 100, sections 160 to 168 both inclusive and form No. 18 of Schedule A.
18 Vic. No. 6	An Act to revive the Absent Defendants Act, and to amend the same.	The whole.
20 Vic. No. 8	An Act to restore writs of inquiry and writs of trial, and to authorise the establishment of separate scales of costs.	The whole.
20 Vic. No. 31	The Common Law Procedure Act of 1857	The whole, except sections 10, 25, 53, and 54.
22 Vic. No. 18	The District Courts Act of 1858 . .	Sections 98, 100, and 101
22 Vic. No. 25	An Act to amend the District Courts Act of 1858.	Section 2.
24 Vic. No. 8	An Act to amend the law with respect to verdicts and judgments in the Supreme Court.	The whole.
46 Vic. No. 17	Criminal Law Amendment Act of 1883	Sections 453, 454, and 455.
47 Vic. No. 7	Limitation of Actions for Trespass Act of 1884.	Section 3.

SECOND SCHEDULE.

FORMS.

No. 1.

Writ where the defendant resides within the jurisdiction.

VICTORIA by the Grace of God, &c.

To C. D. of

We command you that within days after the service of this writ on you, inclusive of the day of such service, you do cause an appearance to be entered for you in Our Supreme Court, at Sydney, in an action at the suit of A.B., and take notice that in default of your so doing the said A.B. may proceed therein to judgment and execution.

Witness, &c.

Section 4.

17 Vic. No. 21,
Sched. A (1).

**C.L.P. Act,
Sch. 2.**

Memorandum to be subscribed on the writ.

N.B.—This writ is to be served within (six) calendar months from the date thereof, or if renewed, from the date of such renewal, including the day of such date, and not afterwards.

Indorsement to be made on the writ before service thereof.

This writ was issued by E. F. of _____ attorney for the said plaintiff, or this writ was issued in person by A. B., who resides at _____ [mention the city town, or parish, and also the name of the hamlet, street, and number of the house of the plaintiff's residence, if any such.]

Indorsement to be made on the writ after service thereof.

This writ was served by X. Y. on L. M. [the defendant or one of the defendants on Monday, the _____ day of _____ 18 ____]

(Signed) X. Y.

As to the number of days for appearance, see RR. 33, 34 (post).

Six months: but see R. 30, post.

Section 10.

17 Vic. No. 21;
s. 8.

Rule 5 of 12
April, 1856.

No. 2.

Indorsement of debt and costs, &c.

The plaintiff claims £ _____ for debt, and £ _____ for costs, and if those sums be paid to the plaintiff, or to his attorney, within the time limited for your appearance, further proceedings will be stayed.

As to the amount for costs to be indorsed, see Scales of Costs, 4th Sch. to Rules, post, and *Borough of Ashfield v. Baldick*, (1895) 11 W.N. 162: but query this case since *Dowling v. Burt*, 14 W.N. 177.

Section 18.

Ibid.
Sched. A (2):

No. 3.

Writ where the defendant being a British subject resides out of the jurisdiction.

VICTORIA by the Grace of God, &c.

To C. D. of _____

We command you that within [here insert a sufficient number of days within which the defendant might appear with reference to the distance he may be at from New South Wales] days after the service of this writ on you, inclusive of the day of such service you do cause an appearance to be entered for you in Our Supreme Court at Sydney, in an action at the suit of A.B., and take notice that in default of your so doing the said A.B. may, by leave of a Court or the Judge, proceed therein to judgment and execution.

Witness, &c.

Memorandum to be subscribed on the writ.

N.B.—This writ is to be served within (six) calendar months from the date thereof, or if renewed, from the date of such renewal, including the day of such date, and not afterwards.

Indorsement to be made on the writ before the service thereof.

This writ is for service out of the jurisdiction of the Court, and was issued by E. F. of _____, attorney for the said plaintiff, or this writ was issued in person by A. B., who resides at [mention the city, town, or parish, and also the name of the hamlet, street, and number of the house of the plaintiff's residence, if any such.]

The indorsement required by the 10th section should be made on this writ, but should allow the defendant the time limited for appearance to pay the debt and costs.

As to time for appearance, see R. 34, post.

Six months: but see R. 30, post.

Section 19.

Ibid.
Sched. A (3):

No. 4.

Writ where the defendant not being a British subject resides out of the jurisdiction.

VICTORIA by the Grace of God, &c.

To C. D., late of _____

We command you that within [here insert a sufficient number of days within which the defendant might appear with reference to the distance he may be at from New South Wales] days after notice of this writ is served on you, inclusive of the day of such service, you do cause an appearance to be entered for you in our Supreme Court at Sydney, in an action at the suit of A. B., and take notice that in default of your so doing the said A.B. may, by leave of the Court or a judge, proceed therein to judgment and execution.

Witness, &c.

Memorandum to be subscribed on the writ.

N.B.—Notice of this writ is to be served within (six) calendar months from the date thereof, including the day of such date, and not afterwards.

**G.L.P. Act,
Sch. 2.**

Indorsements as in other cases.

Notice of the foregoing writ.

To G. H., late of [Bathurst in the Colony of New South Wales] or now residing at [Auckland, in New Zealand.]

Take notice that A. B., of _____, in the Colony of New South Wales, has commenced an action at law against you, C. D., in Her Majesty's Supreme Court of New South Wales, by a writ of that Court dated the _____ day of _____ A.D. 18____ and you are required within _____ days after the receipt of this notice, inclusive of the day of such receipt, to defend the said action by causing an appearance to be entered for you in the said Court to the said action, and in default of your so doing the said A. B. may, by leave of the Court or a judge, proceed thereon to judgment and execution.

[Here state amount of claim as required by 10th section, but allowing the defendant the time limited for appearance to pay debt and costs.]

(Signed) A.B. of &c.

or

E. F. of &c.
Attorney for A. B.

As to time for appearance, see R. 34 (post).

Six months: but see R. 30, post.

No. 5.

Special indorsement.

[After the indorsement required by the 10th section of this Act this special indorsement may be inserted.]

Section 24.
17 Vic. No. 21,
Sched. A (4).

The following are particulars of plaintiff's claim:—

1898.—June 20.	Half-year's rent to this day of house and premises, in _____ street, Sydney	£	s.	d.
	Sept. 12. Ten sacks of flour, at 40s.	25	10	0
	Dec. 1 Money received by defendant	20	0	0
		17	0	0
		62	10	0
	Paid	15	0	0
	Balance due	47	10	0

Or,

To butcher's meat supplied between the 1st of January, 1898, and the 1st of January, 1899	52	0	0
Paid	20	0	0
Balance	32	0	0

[If any account has been delivered it may be referred to, with its date, or the plaintiff may give such a description of his claim as in a particular of demand, so as to prevent the necessity of an application for further particulars.]

Or,

£50, principal and interest, due on a bond dated the _____ day of _____, conditional for the payment of £100.

Or,

£90, principal and interest, due on a covenant contained in a deed dated the _____ day of _____ to pay £100 and interest.

Or,

A penalty of £100, under the Statute 55 Geo. III, c. 137.

Or,

£85 on a bill of exchange for £100, dated the 2nd February, 1899, accepted, or drawn, or indorsed by the defendant.

Or,

£50 on a guarantee, dated the 1st January, 1899, whereby the defendant guaranteed the due payment by E. F. of goods supplied or to be supplied to him.

[To any of the above may be added, in cases where interest is payable, the plaintiff also claims interest on £ _____ of the above sum from the date of the writ until judgment.]

**C.L.P. Act,
Sch. 2.**

N.B.—Take notice, that if a defendant served with this writ, within the jurisdiction of the Court, do not appear according to the exigency thereof, the plaintiff will be at liberty to sign final judgment for any sum not exceeding the sum above claimed [with interest at the rate specified], and the sum of for costs, and issue execution at the expiration of eight days from the last day for appearance.

But execution may be issued forthwith on judgment being signed: R. 182. see *Lazarus v. Stutchbury*, 7 N.S.W.R. 328; 3 W.N. 23.

Section 25.

17 Vic. No. 21,
Sched. A (5).

No. 6.

Judgment in default of appearance where writ specially indorsed.

In the Supreme Court of New South Wales.—

On the day of , A.D. 1899.

[Day of signing the judgment.]

New South Wales }
to wit.

A. B., in his own person [or by , his attorney], sued out a writ of summons against C. D., indorsed according to the Common Law Procedure Act, 1899, as follows:—

[Here copy special indorsement.]

And the said C. D. has not appeared. Therefore it is considered that the said A. B. recover against the said C. D. £ , together with £ for costs of suit.

Section 29.

Ibid. s. 27.

No. 7.

Appearance of writ to summons.

A. B. plaintiff against C.D.

or

against C. D. and another

or

against C. D. and others

[If the defendant appears in person here give his address.]

Entered the

day of

18

The defendant C. D. appears in person

or

E. F. attorney for C. D.

appears for him.

Section 51.

Ibid.
Sched. A (6).

No. 8.

Issues for trial of questions of fact without pleading.

In the Supreme Court of New South Wales.—

The day of

in the year of our Lord 18

Sydney to wit.

Whereas A. B. has sued C. D. and affirms and denies that

[Here state the question or questions of fact to be tried.]

And it has been ordered by the Hon. Mr. Justice according to the Common Law Procedure Act, 1899, that the said question shall be tried by a jury. Therefore let the same be tried accordingly.

Section 70.

Ibid. s. 54.

No. 9.

Commencement of declaration.

[Venue] A. B. by E. F., his attorney [or in person, as the case may be] sues C. D. for [here state the cause of action].

Section 70.

Ibid.

No. 10.

Conclusion of declaration.

And the plaintiff claims £ [or if the action is brought to recover specific goods—claims a return of the said goods, or their value, and £ for their detention].

Section 71:

Ibid. s. 55:

No. 11.

Commencement of declaration after plea of non-joinder.

[Venue] A. B. by E. F., his attorney [or in person as the case may be] sues C. D. and G. H., which said C. D. has heretofore pleaded in abatement the non-joinder of the said G. H. for, &c.

Section 76.

Ibid. s. 61.

No. 12.

Commencement of plea, avowry, or cognisance.

The defendant by M. N., his attorney [or in person as the case may be] says that [here state first defence].

No. 13.

Commencement of plea, &c., after the first.

And for a [second] plea [or avowry, or cognisance] the defendant says that
[here state second, &c., defence.]

or if pleaded to part only—

And for a [second] plea [&c.] as to [stating to what it is pleaded] the defendant says
that, &c.

**C.L.P. Act,
Sch. 2.**

Section 76.

17 Vic. No. 21,
s. 61.

No. 14.

Plea of payment into Court.

The defendant by M.N., his attorney [or in person as the case may be] [if pleaded
to part, say as to £ parcel of the money claimed] brings into Court the sum
of £ and says that the said sum is enough to satisfy the claim of the plaintiff
in respect of the matter herein pleaded to.

Section 81.

Ibid. s. 65.

No. 15.

Joinder of issue.

The plaintiff joins issue upon the defendants first [&c. specifying what or
what part] plea.

The defendant joins issue upon the plaintiff's replication to the first [&c. speci-
fying what] plea.

Section 88.

Ibid. s. 78.

No. 16.

Demurrer.

The defendant [or plaintiff] by M. N., his attorney [or in person] says that the
declaration [or plea, &c.] is bad in substance.

Section 100.

Ibid. s. 82.

No. 17.

Joinder in demurrer.

The plaintiff [or defendant] says that the declaration [or plea, &c.] is good in
substance.

Section 100.

Ibid.

No. 18.

*Rule or summons where a judgment creditor applies for execution against a judgment
debtor.*

[Formal parts as at present.]

C.D. show cause why A. B. [or as the case may be] should not be at liberty to
enter a suggestion upon the roll in an action wherein the said A. B. was plaintiff,
and the said C. D. was defendant, and wherein the said A. B. obtained judgment for
£ against the said C.D. on the day of that it manifestly
appears to the Court that the said A. B. is entitled to have execution of the said
judgment, and to issue execution thereupon, and why the said C. D. should not pay
to the said A. B. the costs of this application to be taxed.

[Note.—The above form may be modified so as to meet the case of an application by or
against the representative of a party to the judgment.]

Section 145.

Ibid.
Sched. A (7).

No. 19.

*Suggestion that the judgment creditor is entitled to execution against the judgment
debtor.*

Section 146.

Ibid.
Sched. A (8):

And now on the day of it is suggested and manifestly appears
to the Court that the said A. B. [or C. D. as executor of the last will and testament of
the said A.B. deceased [or as the case may be] is entitled to have execution of the judg-
ment aforesaid against the said E. F., [or against G. H. as executor of the last will
and testament of the said E. F., [or as the case may be] Therefore it is considered by the
Court that the said A. B. [or C. D. as such executor as aforesaid or as the case may be]
ought to have execution of the said judgment against the said E. F. [or against G. H.
as such executor as aforesaid or as the case may be.]

No. 20.

Writ of revivor.

VICTORIA, by the Grace of God, &c., to E. F., of greeting.

We command you that within eight days after the service of this writ upon you,
inclusive of the day of such service, you appear in our Supreme Court at Sydney to
show cause why A.B. [or C. D. as executor of the last will and testament of the said

Section 147.

Ibid.
Sched. A (9):

C.L.P. Act, Sch. 2. A.B. deceased or as the case may be] should not have execution against you [if against a representative here insert as executor of the last will and testament of deceased or as the case may be] of a judgment whereby the said A. B. [or as the case may be] on the day of in the said Court recovered against you [or as the case may be] £ and take notice that in default of your doing so, the said A.B. [or as the case may be] may proceed to execution.
Witness, &c.

Section 210.

17 Vic. No. 21,
Sched. A (10).

No. 21.

Writ of ejectment.

VICTORIA, &c., to X. Y. Z., and all persons entitled to defend the possession of [describe the property with reasonable certainty] in the parish of in the county [or district] of to the possession whereof A. B. and C. some or one of them claim to be [or to have been on and since the day of A.D.] entitled and to eject all other persons therefrom. These are to command you, or such of you as deny the alleged title within sixteen days after service hereof to appear in person or by attorney in Our Supreme Court at Sydney to defend the said property, or such part thereof as you may be advised in default whereof judgment may be signed, and you turned out of possession.
Witness, &c.

Section 210:

Ibid.
Sched. A (11).

No. 22.

Judgment in ejectment in case of non-appearance.

In the Supreme Court of New South Wales—

The day of 18

[Date of writ.]

Cumberland }
to wit }

On the day and year above written, a writ of our Lady the Queen issued forth of this Court in these words, that is to say:—

VICTORIA, by the Grace of God [here copy the writ] and no appearance has been entered, or defence made to the said writ. Therefore, it is considered that the said A. B. [the claimant] do recover possession of the land in the said writ mentioned with the appurtenances.

Section 210:

Ibid.
Sched. A (12)

No. 23.

Judgment and issue in ejectment when defence limited to part.

In the Supreme Court of New South Wales.

On the day of , A.D. 18

Cumberland }
to wit }

On the day and year above written a writ of our Lady the Queen issued forth of this Court in these words, that is to say,

VICTORIA, by the Grace of God [here copy the writ], and C. D. has on the day of appeared by his attorney [or in person] to the said writ, and has defended for a part of the land in the writ mentioned, that is to say [here state the part], and no appearance has been entered or defence made to the said writ except as to the said part. Therefore it is considered that the said A.B. [the claimant] do recover possession of the land in the said writ mentioned except the said part with the appurtenances, and that he have execution thereof forthwith, and as to the rest let a jury come, &c.

Section 220.

Ibid.
Sched. A (13):

No. 24.

Issue in ejectment where the defence is for the whole.

In the Supreme Court of New South Wales.

On the day of , A.D. 18

Cumberland }
to wit }

On the day and year above written a writ of our Lady the Queen issued forth of this Court in these words, that is to say,

VICTORIA, by the Grace of God [here copy the writ], and C. D. has on the day of appeared by his attorney [or in person] to the said writ, and defended for the whole of the land therein mentioned. Therefore let a jury come, &c.

No. 25.

C.L.P. Act,
Sch. 2.*Entry of verdict in ejectment.*

Afterwards on the day of , A.D. before come Section 223.
the parties within mentioned, and a jury being sworn to try the matters in question 17 Vic. No. 21,
between the said parties upon their oath, say that A.B. [*the claimant*] within men- Sched. A (14).
tioned on the day of , A.D. was and still is entitled to the
possession of the land within mentioned as in the writ alleged. Therefore, &c.

No. 26.

Section 243.

*Judgment for defendant in ejectment on discontinuance.**Ibid.*
Sched. A (15).

In the Supreme Court of New South Wales—

On the day of , 18

[*Date of Writ.*]Cumberland }
to wit.)

On the day and year above written a writ of our Lady the Queen issued forth
of this Court in these words, that is to say,

VICTORIA, by the Grace of God [*here copy the writ*], and C. D. has on the
day of , appeared by his attorney [*or in person*] to the said writ, and
A. B. has discontinued the action. Therefore it is considered that the said C. D. be
acquitted, and that he recover against the said A. B. £ for his costs of defence.

No. 27.

Section 245.

*Judgment for defendant in ejectment on failure to proceed to trial.**Ibid.*
Sched. A (16).

In the Supreme Court of New South Wales—

The day of , 18

[*Date of Writ.*]Cumberland }
to wit.)

On the day and year above written a writ of our Lady the Queen issued forth
of this Court in these words, that is to say,

VICTORIA, by the Grace of God [*here copy the writ*], and C. D. has on the
day of , appeared by his attorney [*or in person*] to the said writ, and
A. B. has failed to proceed to trial, although duly required so to do. Therefore it is
considered that the said C.D. be acquitted, and that he recover against the said A.B.
£ for his costs of defence.

No. 28.

Section 246.

*Judgment for claimant in ejectment on confession.**Ibid.*
Sched. A (17).

In the Supreme Court of New South Wales—

The day , 18

[*Date of Writ.*]Cumberland }
to wit.)

On the day and year above written a writ of our Lady the Queen issued forth
of this Court in these words, that is to say,

VICTORIA, by the Grace of God [*here copy the writ*], and C. D. has on the
day of , appeared by his attorney [*or in person*] to the said writ, and
the said C.D. has confessed the said action [*or has confessed the said action as to*
part of the said land, that is to say, *here state the part*]. Therefore it is considered that
the said A. B. do recover possession of the land in the said writ mentioned [*or of the*
said part of the said land] with the appurtenances and £ for costs.

**C.L.P. Act,
Sch. 3.**

**THIRD SCHEDULE.
FORMS OF PLEADINGS.**

STATEMENTS OF CAUSES OF ACTION.

On contracts.

Section 67.

17 Vic. No. 21,

Sched. B.

Goods sold.

1. Money payable by the defendant to the plaintiff for *[these words money payable, &c., should precede money counts like 1 to 13 but need only be inserted in the first]* goods bargained and sold by the plaintiff to the defendant.

Work and materials.

2. Work done and materials provided by the plaintiff for the defendant at his request.

Money lent.

3. Money lent by the plaintiff to the defendant.

Money paid.

4. Money paid by the plaintiff for the defendant at his request.

Money received.

5. Money received by the defendant for the use of the plaintiff.

Account stated.

6. Money found to be due from the defendant to the plaintiff on accounts stated between them.

For an estate sold.

7. A messuage and lands sold and conveyed by the plaintiff to the defendant.

For goodwill.

8. The goodwill of a business of the plaintiff sold and given up by the plaintiff to the defendant.

For the use of a house and land.

9. The defendant's use by the plaintiff's permission of messuages and lands of the plaintiff.

For the use of a fishery.

10. The defendant's use by the plaintiff's permission of a fishery of the plaintiff.

For hire of goods, &c.

11. The hire of *[as the case may be]* by the plaintiff let to hire to the defendant.

For freight.

12. Freight for the conveyance by the plaintiff for the defendant at his request of goods in ships.

For demurrage.

13. The demurrage of a ship of the plaintiff kept on demurrage by the defendant.

Payee against maker of note.

14. That the defendant on the day of A.D. by his promissory note now overdue promised to pay to the plaintiff £ *[two]* months after date but did not pay the same.

Indorsee against indorser of note.

15. That one A. on &c. *[date]* by his promissory note now overdue promised to pay to the defendant or order £ *[two]* months after date, and the defendant indorsed the same to the plaintiff, and the said note was duly presented for payment and was dishonoured, whereof the defendant had due notice but did not pay the same.

Drawee against acceptor of bill.

16. That the plaintiff on &c. *[date]* by his bill of exchange now overdue directed to the defendant required the defendant to pay to the plaintiff £ *[two]* months after date, and the defendant accepted the said bill but did not pay the same.

Payee against drawer.

17. That the defendant on &c. *[date]*, by his bill of exchange directed to A., required A. to pay to the plaintiff £ *[two]* months after date, and the said bill was duly presented for acceptance and was dishonoured, of which the defendant had due notice but did not pay the same.

Breach of promise of marriage

18. That the plaintiff and defendant agreed to marry one another and a reasonable time for such marriage has elapsed, and the plaintiff has always been ready and willing to marry the [defendant yet the defendant has neglected and refused to marry the plaintiff.

Breach of promise of marriage.

19. That the plaintiff and defendant agreed to marry one another on a day now elapsed, and the plaintiff was ready and willing to marry the defendant on that day, yet the defendant neglected and refused to marry the plaintiff.

Warranty of a horse.

20. That the defendant by warranting a horse to be then sound and quiet to ride sold the said horse to the plaintiff yet the said horse was not then sound and quiet to ride.

For not loading pursuant to charter-party.

21. That the plaintiff and the defendant agreed by charter-party that the plaintiff's ship called the "Ariel" should with all convenient speed sail to R. or so near thereto as she could safely get, and that the defendant should there load her with a full cargo of tallow or other lawful merchandise which she should carry to H. and there deliver on payment of freight £ per ton, and that the defendant should be allowed ten days for loading and ten for discharge and ten days for demurrage, if required, at £ per day, and that the plaintiff did all things

necessary on his part to entitle him to have the agreed cargo loaded on board the said ship at R., and that the time for so doing has elapsed, yet the defendant made default in loading the agreed cargo. **C.L.P. Act, Sch. 3.**

22. That the plaintiff let to the defendant a house, No. 40, George-street, Sydney, for seven years to hold from the day of A.D. at rent. **Upon a lease for**
£ a year payable quarterly of which rent quarters are due and unpaid.

23. That the plaintiff by deed let to the defendant a house, No. 40, George-street, Sydney, to hold for seven years from the day of A.D. **Upon a covenant to repair.**
and the defendant by the said deed covenanted with the plaintiff well and substantially to repair the said house during the said term [according to the covenant] yet the said house was during the said term out of good and substantial repair.

For wrongs independent of contract.

24. That the defendant broke and entered certain land of the plaintiff called the Big Field and depastured the same with cattle. **Trespass to land:**

25. That the defendant assaulted and beat the plaintiff gave him into custody to a policeman and caused him to be imprisoned in a Police Office. **Assault battery and false imprisonment.**

26. That the defendant converted to his own use, or wrongfully deprived the plaintiff of the use and possession of the plaintiff's goods, that is to say, iron, hope, household furniture [or as the case may be]. **Wrongful conversion of goods.**

27. That the defendant detained from the plaintiff his title deeds of land called Belmont in the county of that is to say [describe the deeds]. **Wrongful detention of property, &c.**

28. That the plaintiff was possessed of a mill, and by reason thereof was entitled to the flow of a stream for working the same, and the defendant by cutting the bank of the said stream diverted the water thereof away from the said mill. **Diverting water from a mill.**

29. That the plaintiff was the first inventor of a certain new manufacture that is to say of "certain improvements in the manufacture of sulphuric acid" for which he obtained letters patent for the term of fourteen years from the day of A.D. **Infringement of a patent.**
subject to a condition that the plaintiff should within

six calendar months cause to be enrolled an instrument in writing particularly describing the nature of his said invention, and the plaintiff did within the time prescribed fulfil the said condition, and the defendant during the said term did infringe the said patent right.

30. That the defendant falsely and maliciously spoke and published of the plaintiff the words following, that is to say, "he is a thief," **Defamation of character.**

[if there be any special damage here state it with such reasonable particularity as to give notice to the defendant of the particular injury complained for instance] **(a) Slander.**

whereby the plaintiff lost his situation as overseer in the employ of A.

31. That the defendant falsely and maliciously printed and published of the plaintiff in a newspaper called " " the words following, that is to say, "he is a regular prover under bankruptcies," the defendant meaning thereby that the plaintiff had proved, and was in the habit of proving fictitious debts against the estates of bankrupts with the knowledge that such debts were fictitious. **(b) Libel:**

PLEAS.

Pleas in action on contracts.

32. That he was never indebted as alleged. **Denial of debt.**
[This plea is applicable to declarations like those numbered 1 to 13.]

33. That he did not promise as alleged. **Denial of contract.**
[This plea is applicable to other declarations on simple contracts not on bills and notes such as those numbered 18 to 21. It would be unobjectionable to use "did not warrant" "did not agree" or any other appropriate denial.]

34. That the alleged deed is not his deed. **Denial of deed.**

35. That the alleged cause of action did not accrue within six years [state the period of limitation applicable to the case] before this suit. **Statute of Limitations.**

36. That before action he satisfied and discharged the plaintiff's claim by payment. **Payment.**

37. That the plaintiff at the commencement of this suit was and still is indebted to the defendant in an amount equal to the plaintiff's claim for [here state the cause of set-off, as in a declaration, see forms, ante], which amount the defendant is willing to set off against the plaintiff's claim. **Set-off.**

38. That after the alleged claim accrued, and before this suit, the plaintiff by deed released the defendant therefrom. **Release.**

**C.L.P. Act,
Sch. 3.***Pleas in actions for wrongs independent of contract.*

Not guilty.

39. That he is not guilty.

Leave & license.

40. That he did what is complained of by the plaintiff's leave.

Self-defence.

41. That the plaintiff first assaulted the defendant, who thereupon necessarily committed the alleged assault in his own defence.

Right of way.

42. That the defendant, at the time of the alleged trespass, was possessed of land the occupiers whereof for twenty years before this suit enjoyed, as of right and without interruption, a way on foot and with cattle from a public highway over the said land of the plaintiff to the said land of the defendant, and from the said land of the defendant over the said land of the plaintiff to the said public highway at all times of the year, for the more convenient occupation of the said land of the defendant, and that the alleged trespass was a use by the defendant of the said way.

Right of common.

43. That the defendant, at the time of the alleged trespass, was possessed of land the occupiers whereof for thirty years before this suit enjoyed, as of right and without interruption, common of pasture over the said land of the plaintiff for all their cattle, levant and couchant, upon the said land of the defendant at all times of the year as to the said land of the defendant appertaining, and that the alleged trespass was a use by the defendant of the said right of common.

REPLICATIONS.

Joinder of issue.

44. The plaintiff joins issue upon the defendant's 1st, 2nd, &c., pleas.

Replication to
pleas containing
new matter.45. The plaintiff as to the second plea, says [*here state the answer of the plea as in the following forms*].To plea of
release.

46. That the alleged release is not the plaintiff's deed.

Ibid.

47. That the alleged release was procured by the fraud of the defendant.

To plea of set-off

48. That the alleged set-off did not accrue within six years before this suit.

To self-defence.

49. That the plaintiff was possessed of land whereon the defendant was trespassing and doing damage, whereupon the plaintiff requested the defendant to leave the said land, which the defendant refused to do, and thereupon the plaintiff gently laid his hands on the defendant, in order to remove him, doing no more than was necessary for that purpose, which is the alleged first assault by the plaintiff.

To right of way.

50. That the occupiers of the said land did not for twenty years before this suit enjoy, as of right and without interruption, the alleged way.

NEW ASSIGNMENT.

To the pleas of
right of way
and right of
common.

51. The plaintiff, as to the and pleas, says that he sues, not for the trespasses therein admitted, but for trespasses committed by the defendant in excess of the alleged rights, and also in other parts of the said land, and on other occasions and for other purposes than those referred to in the said pleas.

[If the plaintiff replies and new assigns, the new assignment may be as follows]

52. And the plaintiff, as to the and pleas, further says that he sues, not only for the trespasses in those pleas admitted, but also for, &c.

*[If the plaintiff replies and new assigns to some of the pleas, and new assigns only to the other, the form may be as follows—]*53. And the plaintiff, as to the and pleas, further says that he sues, not for the trespasses in the pleas [*the pleas not replied to*] admitted, but for the trespasses, in the pleas [*the pleas replied to*] admitted, and also for, &c.

ARBITRATION ACT 1902.

TABLE.

Showing how the sections of Acts consolidated have been dealt with.

Section of Repealed Acts.	Section of Consolidated Act.	Remarks.
37 Vic. No. 11, s. 6 ..	14	
55 Vic. No. 32, ss. 1-24	4-27	
s. 25 .....	.....	Omitted ; not required in consolidation.
s. 26 .....	.....	Unnecessary ; see 1897 No. 4, s. 8.
s. 27	3	
s. 28 .....	.....	Short title.

ACT No. XXIX, 1902.

An Act to consolidate the enactments relating to Arbitration. [Assented to, 16th August, 1902.]

BE it enacted by the King's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and Legislative Assembly of New South Wales in Parliament assembled, and by the authority of the same, as follows :—

1. This Act may be cited as the " Arbitration Act, 1902." Short title.
2. The Acts mentioned in the First Schedule are, to the Repeal. extent therein expressed, hereby repealed.
3. In this Act, unless the context or subject-matter otherwise indicates or requires,—
 - " Court " means the Supreme Court or a Judge thereof.
 - " Judge " means a Judge of the Supreme Court.
 - " Rules of Court " means rules made as hereinafter provided.
 - " Submission " means a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not.

A submission to arbitration is distinguished from a mere reference to a valuer to fix a price : see *Re John Fenwick v. Port Jackson S.S. Co.*, (1897) 18 N.S.W.R. 405; 14 W.N. 85.

Interpretation.
55 Vic. No. 32,
s. 27.

S. 4.

References by consent out of Court.

Effect of
submission:

55 Vic. No. 32,
s. 1.

4. A submission, unless a contrary intention is expressed therein, shall be irrevocable, except by leave of the Court or a Judge, and shall have the same effect in all respects as if it had been made an order of Court.

Submission.—Is a written agreement as defined: s. 3, *supra*.

Irrevocable.—See as to this *re Smith and Nelson's Arbitration*, 25 Q.B.D. 545.

Leave to revoke.—See *James v. Attwood*, 7 Scott, 841; *Clarke v. Stocken*, 3 Scott 90; *Scott v. Vansandau*, 1 Q.B. 102; *Hart v. Duke*, 32 L.J.Q.B. 55.

Where circumstances have made the arbitrator an interested party, leave to revoke may be given: *Re Baring Bros.*, 61 L.J.Q.B. 704; see *Re Donkin and Leeds Canal Co.*, 9 Times R. 192. But that is where the agreement was to refer to a particular arbitrator named.

Provisions
implied in
submissions:

Ibid. s. 2.

5. A submission, unless a contrary intention is expressed therein, shall be deemed to include the provisions set forth in the Second Schedule to this Act, so far as they are applicable to the reference under the submission.

Submission means submission whether made before or after the Act: *Re Williams and Stepney Arbitration*, [1891] 2 Q.B. 257; *Abbott v. Lion Fire Insurance Co.*, (1894) 11 W.N. 3.

Power to stay
proceedings
where there is a
submission.

Ibid. s. 3.

6. If any party to a submission, or any person claiming through or under him, commences any legal proceedings in any Court against any other party to the submission, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to such legal proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to that Court to stay the proceedings, and that Court or a Judge if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission, and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings.

The application to stay will usually be by summons before a judge.

Before any step.—Applying for security for costs is a step: *Adams v. Cattley*, 66 L.T. 687; so is issuing a summons for discovery: *Chappell v. North*, (1891) 2 Q.B. 252.

The affidavit in support of the summons must follow the terms of the section and shew defendant's readiness and willingness to arbitrate.

Costs are in the discretion of the judge: s. 24 (*post*).

Discretion of the Court.—*Prima facie* the Court will act upon the agreement; the plaintiff must show reasons against the reference: *Hodgson v. Railway Passengers Assurance Co.*, 9 Q.B.D. 188. But the Court has a discretion and must exercise it: *Re Carlisle*, 44 Ch. D. 200; *Lyons v. Johnson*, 40 Ch. D. 579.

Staying proceedings.—A clause in a policy of insurance making arbitration a condition precedent to liability is valid, and an action will be stayed: *Trainor v. Phoenix Fire Co.*, 65 L.T. 825. Such a clause if pleaded is an answer to the action: *Tait & Co. v. City Mutual Insurance Co.*, (1900) 21 N.S.W.R. 317; 17 W.N. 196.

The Court may stay an action by a person refusing to appoint an arbitrator: *Manchester Ship Canal v. Pearson*, 48 W.R. 689.

There must be a valid subsisting submission, or a stay will not be granted: *Deutsche Springtoff, &c. v. Briscoe*, 20 Q.B.D. 177. And the dispute must be within the arbitration clause: *L. & N.W. & G.W. Railways v. Billington*, (1899) A.C. 79. See also *Hewitt v. Municipality of Broken Hill*, (1893) 10 W.N. 85. The fact that a named arbitrator is an interested party may be ground for refusing a stay: *Nuttall*

v. Mayor of Manchester, 8 Times R. 513. But if the parties have agreed to submit to the decision of a person, such as the engineer in the employ of one of them, they must abide by the submission : *Jackson v. Barry Railway Co.*, (1893) 1 Ch. 238 ; *Eckersley and Mersey Docks Arbitration*, (1894) 2 Q.B. 667.

Where one of the arbitrators after appointment had refused to act, a stay was refused : *Port Jackson S.S. Co. v. Newcastle S.S. Co.*, (1884) 1 W.N. 62.

Where the parties had agreed to refer a matter to arbitration, but differed as to whether the arbitrator should be at liberty to take evidence not upon oath, and no reference had been drawn up or executed, a stay was refused : *Campbell v. Vickery*, (1885) 6 N.S.W.R. 209 ; 2 W.N. 34.

Where an architect had given a certificate, the Court refused to stay proceedings in a suit, although the employer had purported to discharge the architect before the date of the certificate : *Murray v. Cohen*, (1888) 9 N.S.W.R. Eq. 124.

An injunction restraining a party from proceeding with an arbitration may be granted where his conduct has made it inequitable for him so to proceed : *Sneddon v. Kyle*, (1902) 2 S.R. Eq. 112 ; 19 W.N. 182.

The Court of Petty Sessions cannot stay proceedings before it under this section : *Ex parte Vincent*, (1897) 14 W.N. 53.

7. In any of the following cases—

- (a) where a submission provides that the reference shall be to a single arbitrator, and all the parties do not after differences have arisen concur in the appointment of an arbitrator ;
- (b) if an appointed arbitrator refuses to act, or is incapable of acting, or dies, and the submission does not show that it was intended that the vacancy should not be supplied, and the parties do not supply the vacancy ;
- (c) where the parties or two arbitrators are at liberty to appoint an umpire or third arbitrator and do not appoint him ;
- (d) where an appointed umpire or third arbitrator refuses to act, or is incapable of acting, or dies, and the submission does not show that it was intended that the vacancy should not be supplied, and the parties or arbitrators do not supply the vacancy ;

Power for the Court in certain cases to appoint an arbitrator, umpire, or third arbitrator.
55 Vic. No. 32.
s. 4:

any party may serve the other parties or the arbitrators, as the case may be, with a written notice to appoint an arbitrator, umpire, or third arbitrator.

If the appointment is not made within seven clear days after the service of the notice, the Court or a Judge may, on application by the party who gave the notice, appoint an arbitrator, umpire, or third arbitrator, who shall have the like powers to act in the reference and make an award as if he had been appointed by consent of all parties.

The Court cannot act in a case not provided for in the section, as where a submission provided for the appointment of an arbitrator by each side, they to appoint a third, and one party refused to appoint an arbitrator : *Re Smith & Nelson Arbitration*, 25 Q.B.D. 545. If the meaning of the notice to the other party to appoint is clear, the exact form is unimportant : *Eyre v. Corporation of Leicester*, (1892) 1 Q.B. 136.

Where arbitrators had disagreed and the reference was over, it was too late to apply to the Court to appoint an umpire : *Re Hume & Lyell*, (1888) 4 W.N. 122.

8. Where a submission provides that the reference shall be to two arbitrators, one to be appointed by each party, then, unless the submission expresses a contrary intention—

Power for parties in certain cases to supply vacancy.
Ibid. s. 5.

8. 8.

- (a) if either of the appointed arbitrators refuses to act, or is incapable of acting, or dies, the party who appointed him may appoint a new arbitrator in his place ;
- (b) if, on such a reference, one party fails to appoint an arbitrator, either originally or by way of substitution as aforesaid, for seven clear days after the other party, having appointed his arbitrator, has served the party making default with notice to make the appointment, the party who has appointed an arbitrator may appoint that arbitrator to act as sole arbitrator in the reference, and his award shall be binding on both parties as if he had been appointed by consent :

Provided that the Court or a Judge may set aside any appointment made in pursuance of this section.

See notes to previous section.

The only cases in which the Court will make an order setting aside an appointment, are those in which it is shown that the arbitrator from hostility, or incapacity, or some other cause, is unfitted to act : *Williams v. Minister for Lands*, (1901) 18 W.N. 181.

"One to be appointed by each party" means each party to the dispute : *Hewitt v. Municipality of Broken Hill*, (1893) 10 W.N. 85.

The notice must be on some one within the State : *New Pinnacle Co. v. Luhrig Coal, &c., Co.*, (1900) 21 N.S.W.R. 297 ; 17 W.N. 206.

Powers of
arbitrator.

55 Vic. No. 32,
s. 6.

9. The arbitrators or umpire acting under a submission shall, unless the submission expresses a contrary intention, have power—

- (a) to state an award as to the whole or part thereof in the form of a special case for the opinion of the Court ; and
- (b) to correct in an award any clerical mistake or error arising from any accidental slip or omission.

Questions of law may be stated in the form of a special case : s. 19 (*post*).

Witnesses may
be summoned by
subpoena.

Ibid. s. 7.

Proviso.

10. Any party to a submission may sue out a writ of subpoena ad testificandum, or a writ of subpoena duces tecum ; but no person shall be compelled under any such writ to produce any document which he could not be compelled to produce on the trial of an action : Provided that every person whose attendance is so required shall be entitled to the like conduct money and payment for expenses as upon a trial in the Court.

Power to en-
large time for
making award.

Ibid. s. 8.

11. The time for making an award may from time to time be enlarged by order of the Court or a Judge, whether the time for making the award has expired or not.

See next section as to time after an award has been remitted to the arbitrators.

The time may be enlarged even after an award made, and so ratify what has been done : *Lord v. Lee*, L.R. 3 Q.B. 404 ; see *May v. Harcourt*, 13 Q.B.D. 688.

Query, whether there is an appeal from the Judge to the Court under this section ; but where the Judge refused to make an order the Court made a substantive order : *Re John Fenwick and Port Jackson S.S. Co.* (1897) 18 N.S.W.R. 405 ; 14 W.N. 85.

Power to remit
award.

Ibid. s. 9.

12. (1) In all cases of reference to arbitration the Court or a Judge may from time to time remit the matters referred, or any of them, to the reconsideration of the arbitrators or umpire.

(2) Where an award is remitted, the arbitrators or umpire shall, unless the order otherwise directs, make their award within three months after the date of the order. **S. 12.**

"The general principle is that an award is final; and assuming that it is good on the face of it there can be no appeal from it. The only exceptions are where there is corruption on the part of the arbitrator or excess of jurisdiction, or where the arbitrator himself admits there is a mistake, and, as it were, craves the assistance of the Court in setting it right," per *Archibald, J.*: *Dinn v. Blake*, L.R. 10 C.P. 391.

Where a reasonable request is made to an arbitrator to state a case under s. 19, and he refuses, the award may be remitted: *Re Palmer & Co., &c., Arbitration*, (1898) 1 Q.B. 131.

If fresh evidence has been discovered, that may be a ground for sending the award back: *Re Keighley & Co., &c., Arbitration*, (1893) 1 Q.B. 405.

Where certain matters referred were not dealt with in the award it was sent back: *In re Amos*, 14 N.S.W.R. 295; 9 W.N. 194.

Where an award directed certain expenses of wharfage, &c., to be paid, it was sent back to have it ascertained what the amount of these expenses was: *Sahl v. McDonnell*, (1886) 7 N.S.W.R. 385; 3 W.N. 55.

Within three months.—But the time may be enlarged under the power conferred by s. 11: *Sahl v. McDonnell*, (1887) 3 W.N. 115.

13. (1) Where an arbitrator or umpire has misconducted himself the Court may remove him. Power to set aside award.
55 Vic. No. 32,
s. 10.

(2) Where an arbitrator or umpire has misconducted himself, or an arbitration or award has been improperly procured, the Court may set the award aside.

Though by the Interpretation clause, s. 3, *ante*, the Court means the Court or a Judge, yet seeing that in many sections the words expressly used are "Court or a Judge" it would perhaps be better under this section to apply to the Court.

Where a bad notice under s. 8 had been given, the appointment of the arbitrator and subsequent proceedings were set aside: *New Pinnacle Co. v. Luhrig Coal, &c., Co.*, (1900) 21 N.S.W.R. 297; 17 W.N. 206.

Misconduct, &c.—See cases under previous section.

On motion to set aside an award, it may be remitted back: *Sahl v. McDonnell*, 7 N.S.W.R. 385; 3 W.N. 55.

Where arbitrators have omitted to decide matters referred to them, the award may be held bad and set aside, (though it may be remitted back: *Sahl v. McDonnell*, *supra*); *Re Warby and Rose*, (1865) 4 S.C.R. 302; *Ex parte Josephson*, (1867) 6 S.C.R. 126; *Re Burne & Kavanagh*, Knox. 254. But where the omission was as to costs, the party coming to enforce the award, undertaking to pay all costs, was allowed to enforce the award: *Re Burne & Kavanagh*, *supra*.

The arbitrator is judge of the law and the facts and the Court will not interfere with his award, even though he has taken a wrong view: *Thompson v. Briscoe*, (1885) 2 W.N. 13. See *Dinn v. Blake*, cited *supra*, s. 12.

An award, good on the face of it, will not be set aside in the absence of proof of the arbitrator's misconduct, or disregard of some fundamental rule of the administration of justice or admitted mistake: *Falkingham v. Victorian Railway Commissioners*, (1900) A.C. 452.

Arbitrators called in an accountant to make certain calculations on figures supplied by them; *held*, that the award was not vitiated: *Milthorpe v. Spa Hydraulic Sluicing Co.*, (1893) 14 N.S.W.R. 292; 10 W.N. 12.

Where one of the parties was a company and the arbitrators had not subscribed the declaration required by s. 113 of the Companies Act (then in force) it was *held* that as there was nothing in the reference to exclude the terms of the Companies Act the award must be set aside: *Re Trades Hall*, (1890) 11 N.S.W.R. 36. But where the arbitrators, though they did not sign the declaration, appointed an umpire and he made the award, *held* that the award would not be set aside: *Vale of Clwydd Coal Co. v. City Mutual Fire Co.*, (1884) 1 W.N. 69.

Where a reference is made by order of the Court, it was not necessary for the arbitrator to make the declaration required by the Companies Act, though one of the parties was a company: *Zelma G. M. Co. v. Hoskins*, (1894) 16 N.S.W.R. 1; 11 W.N. 130.

S. 13.

And where the submission provided that "all the provisions of the Arbitration Act should apply except so far as excluded by this agreement" it was *held* that the operation of the arbitration clauses of the Companies Act was excluded: *In re Mason Bros.*, (1892) 9 W.N. 23.

Companies Act, 1899.—The consolidated Companies Act, 1899, omits the arbitration clauses, adopting the Arbitration Act, s. 76; and providing for the appointment of an arbitrator under seal or under the hand of the manager or secretary or any two directors, or by the liquidator; and under the seal of a corporation aggregate: s. 77. And see s. 15 (*post*).

It is misconduct to refuse a reasonable request to state a case under s. 19: *Re Palmer & Co., &c., Arbitration*, (1898) 1 Q.B. 131.

Where power was given to arbitrators to call in one of two named persons as umpire, but the arbitrators being unable to obtain the services of either had appointed a third person, the award was set aside: *Ex parte Morris*, (1871) 10 S.C.R. 248.

Where the submission was to two arbitrators and, in case they could not agree, to an umpire, and the award stated that the arbitrators had made their award in the presence and with the assistance of the umpire, *held* that this did not invalidate the award: *Re Burne & Kavanagh*, (1877) Knox 254.

Where it was agreed that the arbitrators or, in case of difference, the arbitrators and the umpire should decide, an award by one arbitrator and the umpire was good: *Johnson v. Blachford*, (1878) 1 S.C.R. N.S. 277. See *Ebsworth v. Hickey*, (No. 2), (1862) 1 S.C.R. 336.

An award may be good as to part of it though bad as to other part: *Re Meaker & Brown*, (1878) 1 S.C.R. N.S. 59.

If the ground of objection is something outside the award, it is not necessary that the rule *nisi* should be drawn up on reading the award: *Casey v. Minister for Works*, (1894) 11 W.N. 55.

In *Bagot v. Carter*, (1887) 4 W.N. 88, the Court *held* that the Act 9 & 10 Wm. III, c. 15, s. 2, still applied, and that an application to set an award aside must be made in the next term after the award is made.

Enforcing
award.

55 Vic. No. 32,
s. 11.

Writs of *fi. fa.*
and *ca. sa.* may
be issued.

37 Vic. No. 11,
s. 6.

14. An award on a submission may, by leave of the Court or a Judge, be enforced in the same manner as a judgment or order to the same effect.

No writ of attachment shall be issued to enforce payment of any money, costs, or expenses under any such award; but writs of *fieri facias* or *capias ad satisfaciendum*, and such other writs as may be necessary, shall be issued by order of the Court, or in vacation by order of a Judge, and every such order shall have the force and effect of a judgment at law or decree in equity.

Where a submission leaves costs in the discretion of the arbitrator, and he directs them to be taxed by the proper officer of the Court, that officer shall proceed to tax the costs without leave of the Court or a Judge: *Pavy v. Tait*, (1902) 19 W.N. 226.

An award of "all costs" may mean solicitor and client costs: *McGillivray v. Bibby*, (1892) 9 W.N. 51.

The arbitrator's fees and costs of award being directed to be paid by one party, the other party took up the award; on summons for the enforcement of the award, *held*, that these fees and costs must be paid by the party liable, irrespective of any other matter: *Re Sydney Wood Block Paving Co.*, (1895) 6 B.C. 12.

It is advisable not to apply to enforce the award till after demand made on the other party: *Pavy v. Tait*, *supra*. Costs of the motion are in the discretion of the Court or Judge: s. 24 (*post*).

A writ of *fi. fa.* may issue on a decision of arbitrators that a sum is due: *Re Burne and Kavanagh*, Knox 254; *Ex parte Greville*, 8 S.C.R. 27.

References under order of Court.

Power to refer
in certain cases.
55 Vic. No. 32,
s. 12.

15. In any cause or matter (other than a criminal proceeding by the Crown),—

(a) if all the parties interested who are not under disability consent; or,

(b) if the cause or matter requires any prolonged examination of documents or any scientific or local investigation which cannot, in the opinion of the Court or a Judge, conveniently be made before a jury or conducted by the Court through its other ordinary officers ; or,

S. 15.

(c) if the question in dispute consists wholly or in part of matters of account ;

the Court or a Judge may at any time order the whole cause or matter or any question or issue of fact arising therein, to be tried before an arbitrator agreed on by the parties, or before a referee appointed by the Court or a Judge for the purpose.

See RR. 282, *et seq.*, *post*.

The consent of a company need not be under seal : *Zelma Gold Co. v. Hoskins*, (1894) 16 N.S.W.R. 1 ; 11 W.N. 139.

Examination of documents.—See *Ormerod v. Todmorden*, 8 Q.B.D. 677.

Matters of account.—See *Hurlbatt v. Barnett*, (1893) 1 Q.B. 79 ; *Clow v. Harper*, 3 Ex. D. 198 ; *Ward v. Pilley*, 5 Q.B.D. 427.

Bankruptcy of one party after the order of reference does not revoke the consent, and the official assignee may elect to proceed : *Petersen v. Lane*, (1895) 11 W.N. 186. See *Ebsworth v. Hickey*, (No. 1) (1862) 1 S.C.R. 329.

16. (1) In all cases of reference under an order of the Court or a Judge in any cause or matter, the referee or arbitrator shall be deemed to be an officer of the Court, and shall have such authority, and shall conduct the reference in such manner, as may be prescribed by rules of Court, and subject thereto as the Court or Judge may direct.

Powers and remuneration of referees and arbitrators.
55 Vic. No. 32, s. 13.

(2) The report or award of any referee or arbitrator on any such reference shall, unless set aside by the Court or a Judge, be equivalent to the verdict of a jury.

(3) The remuneration to be paid to any referee or arbitrator to whom any matter is referred under order of the Court or a Judge shall be determined by the Court or a Judge.

See RR. 282, *et seq.*, *post*.

But an award on reference by order of the Court cannot be set aside on the same grounds as the verdict of a jury ; it is in the same position as an award on a submission : *Sydney and Suburban Hydraulic Co. v. Mercantile Mutual Insurance Co.*, (1896) 13 W.N. 18 ; but see *O'Donoghue v. Oliphant*, 20 W.N. 19.

When the order for reference does not deal with costs they follow the event : *Carr Bros. v. Dougherty*, 67 L.J.Q.B. 371. When under the old Act, the order was silent as to costs, the Court after award of costs amended the order *nunc pro tunc* : *Mulholland v. Byers*, 1 N.S.W.R. 205.

When the order provides that the award may be entered as the verdict, it is unnecessary to move for leave to enter it : *Petrie v. Swift*, (1892) 8 W.N. 92. In other cases a consent order is sufficient, and consent should be asked before moving : *Beard v. Baines*, (1898) 15 W.N. 29.

Remuneration.—See generally on an arbitrator's right to recover his remuneration : *Deane v. Niccol*, (1885) 6 N.S.W.R. 145 ; 2 W.N. 4 ; *Watkins v. Commissioners for Railways*, (1889) 10 N.S.W.R. 262 ; 6 W.N. 99 ; *Willis v. Wakely*, 7 Times R. 604 ; *Crompton v. Ridley*, 20 Q.B.D. 48.

17. The Court or a Judge shall, as to references under order of the Court or a Judge, have all the powers which are by this Act conferred on the Court or a Judge as to references by consent out of Court.

Court to have powers as in references by consent.
55 Vic. No. 32, s. 14.

S. 18.*General.*

Power to compel attendance of witness and to order habeas corpus to issue.

55 Vic. No. 32, s. 15.

18. (1) The Court or a Judge may order that a writ of subpoena ad testificandum or subpoena duces tecum shall issue or compel the attendance before a referee, or before any arbitrator to umpire, of a witness wherever he may be within the jurisdiction.

(2) The Court or a Judge may also order that a writ of habeas corpus ad testificandum shall issue to bring up a prisoner for examination before a referee, or before any arbitrator or umpire.

Statement of case pending arbitration.

Ibid. s. 16.

19. Any referee, arbitrator, or umpire may at any stage of the proceedings under a reference, and shall, if so directed by the Court or a Judge, state in the form of a special case for the opinion of the Court any question of law arising in the course of the reference.

Refusal of a reasonable request to state a case may be such misconduct that an award after such refusal may be remitted back : *Re Palmer & Co., &c., Arbitration*, (1898) 1 Q.B. 131.

At any stage of the proceedings means before award : *Tabernacle Building Society v. Knight*, (1892) A.C. 298 ; but an award may be remitted with directions to state a special case : *Re Kirkleatham Local Board Arbitration* (1893) 1 Q.B. 375.

Judges may make general rules and orders.

Ibid. s. 17.

20. The Judges of the Supreme Court, or any two of them, may, from time to time, make general rules and orders for carrying out the purposes of this Act into effect.

See RR. 282, *et seq.*, (post).

In all cases of arbitration orders may be made for obtaining evidence.

Ibid. s. 18:

21. In all cases of reference to arbitration under any authority whatsoever it shall be lawful for the Court, or a Judge thereof, to make an order or issue a commission for the examination of any party to such reference, or any witness whose evidence, by reason of absence or intention to depart from New South Wales, or illness, age, distance of residence, or other cause, would otherwise be liable to be lost, and to give all such directions as to the time, place, and manner of examination and other matters connected therewith as such Court or Judge shall think fit. And every such order or commission may be made or issued in like manner as orders are made or commissions issued for the examination of witnesses in any cause in the said Court in its common law jurisdiction, or as near thereto as may be. Any person authorised to take the evidence of witnesses under any such order or commission shall take such evidence upon oath.

See Witnesses Examination Act, (post).

Witnesses to have same protection as on trials.

Ibid. s. 19.

22. No person shall be compelled under any such order or by any arbitrator to answer any question he would not be compelled to answer at a trial.

Evidence taken under orders, &c., to be received.

Ibid. s. 20.

23. All evidence taken under any such order or commission shall be received by the arbitrators, saving all just exceptions, in like manner as evidence taken under any order or commission made or issued by the Court or a Judge in a cause pending therein is received at the trial of such cause.

Costs.

Ibid. s. 21:

24. Any order made under this Act may be made on such terms as to costs, or otherwise, as the authority making the order thinks just.

25. Any person who wilfully and corruptly gives false evidence before any referee, arbitrator, or umpire shall be guilty of perjury, as if the evidence had been given in open Court, and may be dealt with, prosecuted, and punished accordingly.

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Penalty for perjury.
55 Vic. No. 32, s. 22.

26. This Act shall apply to any arbitration to which the Government of the State is a party.

Government to be bound.
Ibid. s. 23.

27. This Act shall apply to every arbitration under any Act passed before or after the commencement of this Act as if the arbitration were pursuant to a submission, except in so far as this Act is inconsistent with the Act regulating the arbitration, or with any rules or procedure authorised or recognised by that Act.

Application of Act to references under statutory powers.
Ibid. s. 24.

See *Zelma Gold Co. v. Hoskins*, (1894) 16 N.S.W.R. 1; 11 W.N. 139.

SCHEDULES.

Section 2. 1

FIRST SCHEDULE.

Reference to Act.	Title or Short title.	Extent of Repeal.
37 Vic. No. 11	An Act to amend the law of arrest and imprisonment on civil process.	Section 6.
55 Vic. No. 32	Arbitration Act, 1892	The whole.

SECOND SCHEDULE.

Section 5.

Provisions to be implied in submissions.

(a) If no other mode of reference is provided, the reference shall be to a single arbitrator.

(b) If the reference is to two arbitrators, the two arbitrators may appoint an umpire at any time within the period during which they have power to make an award.

(c) The arbitrators shall make their award in writing within three months after entering on the reference, or after having been called on to act by notice in writing from any party to the submission, or on or before any later day to which the arbitrators, by any writing signed by them, may from time to time enlarge the time for making the award. And see s. 11, *ante*.

(d) If the arbitrators have allowed their time or extended time to expire without making an award, or have delivered to any party to the submission or to the umpire a notice in writing stating that they cannot agree, the umpire may forthwith enter on the reference in lieu of the arbitrators.

(e) The umpire shall make his award within one month after the original or extended time appointed for making the award of the arbitrators has expired, or on or before any later day to which the umpire by any writing signed by him may from time to time enlarge the time for making his award.

See *Tyson v. McEvoy*, 3 S.C.R. 359.

(f) The parties to the reference, and all persons claiming through them respectively, shall, subject to any legal objection, submit to be examined by the arbitrators or umpire, on oath, in relation to the matters in dispute, and shall, subject as aforesaid, produce before the arbitrators or umpire all books, deeds, papers, accounts, writings, and documents within their possession or power respectively which may be required or called for, and do all other things which, during the proceedings on the reference, the arbitrators or umpire may require.

(g) The witnesses on the reference shall, if the arbitrators or umpire thinks fit, be examined on oath.

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(h) The award to be made by the arbitrators or umpire shall be final and binding on the parties and the persons claiming under them respectively.

(i) The costs of the reference and award shall be in the discretion of the arbitrators or umpire, who may direct to and by whom and in what manner those costs or any part thereof shall be paid, and may tax or settle the amount of costs to be so paid or any part thereof, and may award costs to be paid as between solicitor and client.

See *Pavy v. Tait*, 19 W.N. 226, as to taxation.

ARREST ON MESNE PROCESS ACT 1902.

COMMISSIONER'S MEMORANDUM AND CERTIFICATE.

Clause 12. The substitution of "any" for "such" is in accordance with the invariable practice, and with an unreported decision of the Supreme Court.

Clause 14. The proviso to the original section is omitted as inconsistent with and impliedly repealed by the provisions of the Bankruptcy Act.

I certify that this Bill solely consolidates and in no way alters, adds to, or amends the law as contained in the enactments therein consolidated.

CHAS. G. HEYDON,
Commissioner for the consolidation of the Statute Law.

TABLE

Showing how the sections of Acts consolidated have been dealt with.

Section of Repealed Acts.	Section of Consolidated Act.	Remarks.
9 Geo. IV, No. 2, s.1		Adopts 7 & 8 Geo. IV, c. 71, <i>infra</i> .
7 & 8 Geo. IV, c. 71 ss. 1-10		Omitted ; superseded by 3 Vic. No. 15.
3 Vic. No. 15, s. 1	4	Part relating to "remote parts" omitted as obsolete.
2	5, 6	
3	7, 9, 10	
4	8	
5	11-13	
6	.....	
7	.....	
13 Vic. No. 12, s. 1	7	Date of commencement.
13 Vic. No. 12, s. 1	7	Part dealt with in Judgment Creditors Remedies Act, 1901.
24 Vic. No. 14, s. 1	15, 16	
2	17, 18	
3	19	
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7	23-5	
8	26-7	
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Section of Repealed Act.	Section of Consolidated Act.	Remarks.
37 Vic. No. 11, s. 1	5	
2	.....	Dealt with in Seamen's Act, 1898.
3	.....	Omitted ; obsolete.
4	14	Part dealt with in Defamation Act, 1901.
5	14	Part dealt with in Judgment Creditors Remedies Act, 1901.
6	.....	Not repealed. To be dealt with in Arbitration Bill.
7	.....	Omitted ; obsolete.
8	.....	Repealing section.
9	.....	Short title.

ACT No. XXIV., 1902.

An Act to consolidate the enactments relating to arrest on mesne process. [Assented to, 31st July, 1902.]

BE it enacted by the King's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and Legislative Assembly of New South Wales in Parliament assembled, and by the authority of the same, as follows :—

PART I.

PRELIMINARY.

Short title and division.

1. This Act may be cited as the " Arrest on Mesne Process Act, 1902," and is divided into Parts, as follows :—

PART I.—PRELIMINARY—ss. 1–3.

PART II.—ARREST AND BAIL—ss. 4–10.

PART III.—DISCHARGE—ss. 11–14.

PART IV.—COMMISSIONER AT NEWCASTLE—ss. 15–35.

Repeal:

2. (1) The Acts mentioned in the Schedule to this Act are to the extent therein expressed hereby repealed.

(2) All persons appointed under any Act hereby repealed, and holding office at the time of the passing of this Act, shall remain in office as if this Act had been in force at the time they were appointed and they had been appointed hereunder, and this Act shall apply to them accordingly.

(3) All rules made under the Acts hereby repealed, and in force at the time of the passing of this Act shall be deemed to have been made hereunder.

Interpretation.

24 Vic. No. 14, s. 17.

3. In this Act, unless the context or subject-matter otherwise indicates or requires,—

" Capias " means *capias ad respondendum*.

" Court " means the Supreme Court.

" Defendant " in Part IV includes a person against whom an action is about to be brought.

" Judge " means a Judge of the Court.

" Plaintiff " in Part IV includes a person about to commence an action.

PART II.

S. 4.

ARREST AND BAIL.

4. No person shall be arrested upon mesne process in any civil action in any Court except in the cases and in the manner hereinafter provided.

No arrest on mesne process except under this Act
3 Vic. No. 15,
s. 1.

5. In any action in the Court in which the defendant, under the law in force before the passing of the Act third Victoria number fifteen, would have been liable to arrest, whether upon the order of a Judge, or without such order, if a Judge is satisfied by affidavit disclosing the facts constituting the ground of the plaintiff's claim, or by evidence on oath before such Judge,—

Order to hold to bail.
Ibid. s. 2.
37 Vic. No. 11,
s. 1.

(a) that the plaintiff has *prima facie* a good cause of action in respect of his claim against the defendant, and if such Judge is also satisfied by the affidavit of the plaintiff or some other person—

(b) that such cause of action is to the amount of twenty pounds or upwards, or that the plaintiff has sustained damage to that amount; and

(c) that any defendant is about to remove or is making preparations to remove out of the jurisdiction of the Court; and

(d) that such action will be defeated unless such defendant is forthwith apprehended; and

(e) that the application is made within a reasonable time after the fact of the defendant's intention so to remove came to the knowledge of the plaintiff or might have become known to him by reasonable diligence on his part,

such Judge may by a special order direct that such defendant shall be held to bail for such sum as such Judge thinks fit, not exceeding the amount of the debt or damages.

Compare with this section s. 3 of the English Act 1 & 2 Vic. c. 110. s. 3; Chitty's Archbold, 762.

In any action, &c.—Before the Statute where the cause of action arose from a debt or money demand, or where the damages could be ascertained by mere calculation, the defendant might be held to bail as a matter of course. But where the action founded in damages and those damages were unliquidated, a judge's order had to be obtained. So that it appears an order may now be made in any action, either for debt or damages, under the circumstances mentioned in this Statute: see Chitty's Archbold, 744, *et seq.*; as to the few excepted cases, see *ibid.*; and as to personal privilege, *ibid.* 728.

Affidavits.—Affidavits to found an arrest can be sworn before the commencement of the action; but in that case must not be entitled in the action: R. 215, (*post*). A writ was set aside for irregularity in the jurat of the affidavit: *Mock Sing v. Dat*, (1902) 2 S.R. 333; 19 W.N. 230.

Name of defendant.—The defendant should be described by his Christian and surname in full; but see R. 229 (*post*) and s. 65 of the C.L.P. Act (*ante*).

Cause of action.—"The affidavit upon which a *ca. re.* is applied for must be as accurate and concise as a declaration," per *Cohen, J.*: *Hafer v. Moss*, (1902) 19 W.N. 12. "That defendant is justly and truly indebted to the plaintiff for goods sold" is not enough: *Whyte v. Cargill*, (1863) 2 S.C.R. 171.

Where several causes of action are set out, but some insufficiently, the whole is bad if the amounts for each cause cannot be separated: *Prince v. Kennedy*, (1863) 2 S.C.R. 174; no arrest can be founded on a claim for interest merely: *ibid.*; unless due on express contract to pay it, which must appear on the affidavits: *Callum v. Leeson*, 2 Dowl. 381; "balance of an account current" discloses no cause of action: *Prince v. Kennedy*, (*supra*). In *Thompson v. Bartlett*, (1886) 2 W.N. 105, a writ was set aside, no cause of action being shown. "Services rendered to defendant and accounts paid for him" is not enough: *Siemann v. Cooke*, (1887) 4 W.N. 72.

S. 5.

Statement that "plaintiff had sustained damage to the amount of £107" (showing in what way) and adding that he had a cause of action against defendant to that amount, *held enough* : *Watson v. Patterson*, (1889) 5 W.N. 84.

And see cases on the subject of cause of action, *ante*, C.L.P. Act, s. 18, note; and Chitty's Archbold, 751, *et seq.*

To the amount of twenty pounds or upwards.—The affidavit in support of an application for a *ca. re.* stated that the plaintiff had a cause of action against the defendant for the sum of £2000 for breach of promise of marriage. *Held*, that this was insufficient, and that the plaintiff should have alleged that she had suffered damage to the extent of £20 and upwards : *Hafer v. Moss*, (*supra*).

Costs of an arrest allowed although less than £20 was in fact recovered : *Solomon v. Johnston*, (1867) 6 S.C.R. 255; and as to costs where less than the amount in the bond is ultimately recovered, see *Kittler v. Murphy*, 11 S.C.R. 68; s. 9 (*post*).

Is about to remove . . . and that such action will be defeated.—The judge must be satisfied by affidavit or evidence on oath not only that the defendant is about to remove out of the jurisdiction, but that such removal will have the effect of defeating the action. A mere temporary absence intended is not enough : *McCallum v. Golding*, (1885) 1 W.N. 155. In *Nicholls v. Rosenfeld*, (1885) 2 W.N. 51, a writ was set aside without costs, the judge being satisfied on defendant's affidavit that he was not leaving the colony. "That the action will be defeated" has been construed to mean that the defendant will not be within the jurisdiction of the Court at the time of final judgment, so as to be then taken in execution : *Bank of Australasia v. Dunlop*, Steph. Sup. Ct. Pr., 125; but "the meaning of an action being probably defeated must be taken to be that the plaintiff will not be able eventually to obtain satisfaction in this colony for his debt, and the affidavit in support of the arrest must either state this probable result in the terms used in the Statute or must state circumstances from which that result can reasonably and naturally, and not by conjecture merely, be deduced;" *per Stephen, C.J.*, *Keep v. Benjamin*, (1865) 4 S.C.R. 321. In *Lyons v. Wylie*, (1884) 1 W.N. 82, the judge, not being satisfied that "the intention of the defendant in wanting to go away was to defeat the plaintiff's claim" set aside the *ca. re.* But it is to be observed on this case that the Statute seems to require the plaintiff to show an intention on the part of the defendant to go away and the *fact* (whether it be also intended or not) that such departure will defeat the plaintiff's claim. The case may have really turned on the fact that defendant's absence would be temporary only, as in *McCallum v. Golding*, (*supra*), and *Freeman v. Jacobson*, (1888) 4 W.N. 118.

The fact that defendant would be out of the jurisdiction when final judgment would be obtained in the ordinary course is sufficient to show that the action would be defeated: *Buhler v. Rets*, (1897) 3 W.N. 161; *Hirst v. Dunlop*, Stephen's Practice, p. 125; *Edgar v. Cork*, (Daily Telegraph, July 16th, 1896); *Pearl v. Daldorf*, (1902) 19 W.N. 1. See however, the observations of *Manning, J.*, in *Godwin v. Cashion*, (1878) 1 S.C.R. (N.S.), 34.

The affidavit, if on information and belief, must give the source of the information : *Shack Ying v. Loo Fook*, (1885) 1 W.N. 109; *Gibbons v. Spalding*, 11 M. & W. 173; and must (as in all *ex parte* applications) disclose all the material facts : *Godwin v. Cashion*, (*supra*); and see *Watson v. Hutchins*, (1881) T.T.R. 47.

Reasonable time.—The application for and the service of the writ must be promptly effected : *Wood v. Dunning*, (1885) 1 W.N. 128. For what has been held to be "reasonable time" see *Hall v. Young*, (1884) 1 W.N. 62; *Somerville v. Hall*, *ibid.* 87; and *Coppin v. Rogers*, (1887) 3 W.N. 107.

Order.—Though the affidavits may be sworn before the issue of the writ of summons, the order cannot be made till after the writ issues : R. 216 (*post*); though it need not have been served : R. 225; and must be intitled in the action, *ibid.* For form of order see Chitty's Forms, 405.

Bail for such sum, &c.—By Rule 228 (*post*) the bond is to be for twice the amount mentioned in the writ, where that amount does not exceed £50; or, where that amount exceeds £50, for the amount mentioned in the writ and £50 more to cover costs; and this, apparently, independently of the amount sworn to. Whether this is consistent with the section *quære*; but see *Pearl v. Daldorf*, (1902) 19 W.N. 1.

Before the writ issues a *præcipe* must be filed, R. 217 (*post*), in the form given in the 1st Schedule to the Rules.

The writ must be in the form in the 1st Schedule to the Rules : R. 217.

The forms must be strictly followed : see R. 217 (*post*) and notes.

6. (1) Thereupon the plaintiff, within the time expressed in such order but not afterwards, may sue out one or more writ or writs of *capias* against such defendant.

S. 6.

Issue of writ of *capias*.

(2) Every such writ shall be in the form prescribed by the Judges.

3 Vic. No. 15, s. 2.

See RR. 215, *et seq.* (post).

As to *alias* and *pluries* writs, R. 221; form of writ, R. 217.

7. (1) The sheriff or other officer to whom any such writ is directed shall, before the return of the said writ but not afterwards, proceed to arrest such defendant thereupon.

Execution of writ.

Ibid., s. 3.

(2) Such writ may be lawfully executed upon a Sunday.

13 Vic. No. 12 s. 1.

As to time for returning the writ, see RR. 223, 224 (post).

Service of the writ should be effected promptly: *Woods v. Dunning*, (1885) 1 W.N. 128.

The date of the arrest must be indorsed on the writ: R. 222 (post).

The writ (and a copy for service) should be left with the sheriff; the copy should be a correct one: see *Young v. Halfnights*, (1887) 1 W.N. 61, where it was held that the fact that the copy was incorrect in not being addressed to anyone, and in not showing the name of plaintiff's attorney (which was however indorsed on the copy) was not a reason for setting aside the *ca. re.* The copy must be delivered to the defendant, in accordance with the direction in the *capias*: see Form, 1st Schedule, (post).

8. Such order may be made and the defendant arrested in pursuance thereof at any time after the commencement of the action and before final judgment is obtained therein.

Order and arrest to be during pendency of action.

3 Vic. No. 15, s. 4.

9. The defendant when arrested shall remain in custody until he has given a bail bond to the sheriff or other officer, or has made deposit of the sum endorsed on such writ of *capias*, together with ten pounds costs.

Defendant to remain in custody until he finds bail or makes deposit.

Ibid. s. 3.

The sheriff prepares the bail bond, but is entitled to payment for so doing by the defendant: *Chitty's Archbold*, 799; Form of bond, *Chitty's Forms*, 408. See RR. 228, *et seq.*, (post). Instead of giving the bail bond, the defendant may pay to the sheriff the amount indorsed on the writ and ten pounds for costs: see Form 5, 1st Schedule to Rules, (post). If special bail be put in plaintiff is entitled to have this money paid out to him, but only by judge's order: R. 258 (post), or, *quære*, by order of the Court under s. 2 of the Statute 43 Geo. III, c. 46; see *Bayless v. Dixon*, (1883) 4 N.S.W.R. 62.

If special bail be not put in, or the money mentioned in the *capias* and fifty pounds additional deposited in lieu of bail, R. 257, plaintiff is entitled to have the money deposited paid out to him, on motion to the Court: *Bayless v. Dixon*, (supra). The amount of ten pounds referred to in that case was apparently the amount mentioned in the English Act 7 & 8 Geo. IV, c. 71, adopted here by the Act 9 Geo. IV, No. 2, and now by this Act repealed. By R. 257, £50 for costs is to be added to the amount in the *capias* as a deposit in lieu of special bail.

Quære whether R. 258 referring to payment of the money deposited by "Judge's order" is not inconsistent with s. 2 of 43 Geo. III, c. 46, which refers to orders of the Court.

Note that in *Kittler v. Murphy*, (1872) 11 S.C.R. 68, s. 3 of the Act last mentioned was held not in force, following *Simmonds v. Taylor*, (*ibid.* in nota); *Ricketts v. Noble*, 3 Exch. 521; *Ireland v. Berry*, 5 Q.B. 554. This section provided that where less than the amount for which defendant was arrested was recovered, defendant should be entitled to the costs of suit. Plaintiff is therefore now entitled to costs, though recovering less than the amount for which he arrested defendant; and see *Solomon v. Johnston*, 6 S.C.R. 255.

As to where defendant should be taken on his arrest, see *Chitty's Archbold*, 808; there seems no reason why the section of the Statute there referred to, 32 Geo. II, c. 28, should not be held to be in force in this State: see *Bayless v. Dixon*, (1883) 4 N.S.W.R. 62.

S. 10.

Subsequent
proceedings
subject to Rules
of Court.

3 Vic. No. 15,
s. 3.

10. All subsequent proceedings as to putting in and perfecting special bail shall be subject to the Rules of the Court made for the practice of the Court in such cases.

As to special bail, see RR. 236, *et seq.*

PART III.

DISCHARGE.

Application for
order nisi for
discharge.

Ibid. s. 5.

11. Any person arrested upon a writ of *capias* may apply to a Judge at any time after such arrest for an order on the plaintiff to show cause why such person should not be discharged out of custody.

An order.—The plaintiff must be ordered to show cause by a rule or order of a judge. An order made by a judge in terms of a summons signed by the chief clerk of the Supreme Court, calling upon the plaintiff to appear before a judge in Chambers to show cause why the *ca. re.* should not be set aside, and the defendant discharged from custody, was set aside on motion, and it was held that the chief clerk had no power to issue the summons: *Falk v. Rowley*, (1876) 14 S.C.R. 299; see also *Coulshaw v. Cummins*, (1884) 1 W.N. 21; *Cooper v. Holdsworth*, (1884) 1 W.N. 83; *Guligelmini v. Cunningham*, (1890) 7 W.N. 4.

Where the application is founded on materials not before the judge who made the order the application should be to discharge the defendant out of custody, or for the bail bond to be delivered up and cancelled; but where there is any irregularity in the proceedings on which the order has been obtained the application may be also to set aside the judge's order and the writ: *Chitty's Archbold*, 796.

As to grounds entitling the defendant to his discharge or to have the order and writ set aside, see the various cases cited in notes to the sections of this Act, and under the Rules, 215, *et seq.*, (*post*).

The defendant may waive his right to take advantage of any irregularity in the proceedings, as, by taking some further step: *Cooper v. Holdsworth*, (1884) 1 W.N. 83. Giving a bail bond is no waiver: *Holloway v. Roulledge*, (1862) 1 S.C.R. 15.

Defendant is entitled to his discharge if plaintiff does not pursue his action diligently: R. 267.

Proceedings
upon order nisi.
Ibid.

12. Any Judge may make absolute or discharge such order, and may direct the costs of the application to be paid by either party, and may make such other order therein as he thinks fit.

The defendant may be put upon terms, and frequently is so; as to enter an appearance, and bring no action for the arrest: *Prince v. Kennedy*, (1863) 2 S.C.R. 174. As to the right to bring an action where an order has been set aside for irregularity, see *Mock Sing v. Dat*, (1902) 2 S.R. 333; 19 W.N. 230. In *McCallum v. Golding*, (1885) 1 W.N. 155, terms imposed by the judge in Chambers that defendant should bring the sum claimed into Court, were set aside under the particular circumstances by the Court on appeal.

Costs.—The costs of the proceedings are by the section in the discretion of the judge. In general they will be given when the plaintiff's conduct has been oppressive or otherwise improper: *Chitty's Archbold*, 797. See the various cases cited in our own Courts.

Appeals

Ibid.

13. Upon the application of either party dissatisfied with any such order, the Court may discharge or vary the same.

See *e.g. McCallum v. Golding*, (1885) 1 W.N. 155, cited in note to previous section.

Discharge on
Bankruptcy.

37 Vic. No. 11,
s. 5.

1898, No. 25;
s. 133 (3).

14. (1) Any person in the custody of any sheriff, gaoler, or officer under any such writ shall upon the sequestration of his estate in pursuance of the law in force for the time being relating to bankruptcy, be entitled to his discharge from such custody on

the order of the Judge in Bankruptcy, and shall be forthwith discharged from such custody either absolutely or on such conditions as the said Judge may impose.

S. 15.

(2) No such sheriff, gaoler, or officer shall incur any liability in respect of such discharge to any person for anything done by him under this section. 87 Vic. No. 11, s. 4.

PART IV.

COMMISSIONER AT NEWCASTLE.

15. The Chief Justice may by commission under his hand and the seal of the Court appoint some fit person residing at Newcastle or within five miles thereof to be a commissioner of the Court for the purposes of this Act. Appointment of Commissioner, 24 Vic. No. 14, s. 1.

16. (1) Such commissioner shall at the instance of any plaintiff have power to issue writs of summons and of *capias* in the Court against any defendant about to depart out of New South Wales from the said port of Newcastle in cases where by law an arrest upon mesne process is allowed in an action under this Act. Issue of writs of summons and *capias*. Ibid.

(2) Every such writ of *capias* shall (except where hereby otherwise provided) have the same force and effect as an ordinary writ of *capias* issued out of the Court at Sydney directed to the sheriff.

See s. 5, (ante).

17. (1) No writ of summons shall be issued under this Part except to ground a writ of *capias* to be issued hereunder. Requisites to obtain *capias*. Ibid. s. 2.

(2) No writ of *capias* shall be issued under this Part unless proof by affidavit is first given to the commissioner that the defendant is about to depart out of New South Wales from the said port of Newcastle, and of all such other facts and matters which are necessary to be given and established to obtain an order from a Judge for the issue of an ordinary writ of *capias* out of the Court at Sydney.

See s. 5, (ante).

18. (1) No such writ of *capias* shall be issued under this Part unless the plaintiff shall first give a bond of two sufficient persons (of whom the plaintiff if of sufficient ability in the opinion of the commissioner may be one) to the satisfaction of the commissioner to the defendant, in a sum of money to be fixed by such commissioner not being less than double the amount for which the defendant is liable to be arrested or held to bail under such writ, conditioned to be void on payment to the defendant of all damages costs and charges which may be adjudged to him in any action by him against the plaintiff and the bailiff to whom such writ of *capias* is directed or either of them for or by reason of such writ having been issued, or of his being arrested thereunder, or of any wrong or damage sustained by him on account thereof, or of any wrongful act or omission of such bailiff in or about the execution thereof, or otherwise in relation thereto, and of all costs charges and expenses which upon any application by the defendant to the Court Plaintiff to give bond as security against abuse of process. 24 Vic. No. 13, s. 2.

- 8. 18.** or a Judge for any rule or order to set aside any such writ or to discharge the defendant from custody thereunder or to cancel any bail bond given thereunder or otherwise in relation to or connected with such writ or anything done thereunder may be adjudged or ordered to be paid to the defendant.

Bond not to be for more than four hundred pounds.

To be sent to Prothonotary for delivery to defendant.

(2) Provided always that the amount for which such bond shall be given shall in no case exceed the sum of four hundred pounds.

(3) The commissioner shall forthwith transmit such bond to the prothonotary of the Court, who shall, upon demand, deliver such bond to the defendant or any one applying for the same on his behalf.

No order necessary for capias.
24 Vic. No. 14, s. 3.

19. It shall not be necessary for any order to be made to warrant the issuing of any writ of capias under this Part ; but the commissioner shall by memorandum thereon under his hand certify on whose application and on what affidavit or affidavits and when it was issued, and the amount for which the defendant is to be arrested or held to bail thereunder, in the form or to the effect following :—

“ This writ was issued this day of 19 under the provisions of the Arrest on Mesne Process Act, 1902, on the application of the therein named A B [*naming the plaintiff*], and upon reading the affidavit of [*naming the deponent*] sworn on the day of 19 [*describing each affidavit if more than one*]. And the defendant C D [*naming the defendant*] is to be arrested or held to bail hereunder for or in the sum of pounds [*specifying the amount*]. E F [*here to be signed by the Commissioner*], Commissioner under the said Act.”

Capias directed to special bailiff.

Ibid. s. 4.

Powers of bailiff.
Ibid.

20. (1) Every writ of capias issued under this Part shall instead of being directed to the sheriff be directed to some person to be specially named by the plaintiff as a bailiff to execute the same.

(2) Such bailiff shall have all the authority thereunder which the sheriff has under an ordinary writ of capias issued out of the Court at Sydney directed to him, save only that such bailiff shall not have power to appoint a deputy to execute the same, but shall execute it personally with such assistant or assistants (if any) as he may require in that behalf.

Persons not bound to act as bailiffs without first agreeing.
Ibid. s. 5.

21. (1) No person shall be bound to accept the office of or to act as a bailiff under any writ issued in pursuance of this Part unless he consents or agrees so to do.

(2) Every person who consents or agrees so to do shall be bound to act as such bailiff under the writ directed to him until his whole duty as such bailiff under such writ is fully performed.

Form of writs:
Ibid. s. 6:

22. Every writ of summons and of capias issued under this Part shall be issued under the signature and seal of the commissioner issuing the same, but in all other respects (except where other provision is hereby made) shall be in the same form and shall

have all such notices and endorsements thereon respectively as are required in respect of ordinary writs of summons and of capias issued out of the Court at Sydney.

S. 22.

See R. 217 (*post*).

23. It shall not be requisite to file or deliver any præcipe for or in respect of any writ of summons or of capias issued under this Part.

No præcipe required.
24 Vic. No. 14, s. 7.

24. Every writ of summons issued under this Part shall be the commencement of an action in the Court by the plaintiff against the defendant.

Summons to be commencement of action.
Ibid.

25. The commissioner upon issuing any such writ of summons or capias shall forthwith transmit copies thereof and of every endorsement thereon and the original affidavits upon which any such writ of capias was issued by him to the office of the prothonotary of the Court to be there filed and kept.

Copy of writs to be sent to Supreme Court Office.
Ibid.

26. The commissioner shall be entitled to receive and retain for his own use for issuing any writ of summons under this Part the sum of five shillings, and for issuing any writ of capias the sum of one pound, and to no other fees, payment, or remuneration whatsoever.

Commissioner's fees.
Ibid. s. 8.

27. Every plaintiff issuing or obtaining any such writ of summons or of capias shall be entitled to the same costs thereupon as he would be entitled to upon issuing or obtaining a similar writ out of the Court at Sydney in the ordinary way.

Plaintiff's costs:
Ibid.

28. No action shall lie against the commissioner for issuing any writ of capias under this Part unless the plaintiff in such action shall allege and prove that the commissioner knowingly and wilfully issued the same without reasonable proof being given to him to warrant the issuing thereof and also that in issuing the same he acted corruptly.

No action against commissioner except in case of corruption.
Ibid. s. 9.

29. Every bailiff to whom a writ of capias issued under this Part is directed, and who consents and agrees to act as such bailiff to execute the same, shall make a due return thereto to the Court in like manner as the sheriff is bound to make a return to an ordinary writ of capias issued out of the Court at Sydney directed to him, and shall be subject to attachment and action in respect of the execution of such writ or incident thereto, and to an action at the suit of the plaintiff or defendant for any wrongful act or omission by him in or about the execution of such writ and incident thereto, in like manner as the sheriff is liable under the same circumstances in respect of an ordinary writ of capias issued out of the Court at Sydney and directed to him.

Bailiffs to return writs of capias.
Ibid. s. 10.

Liabilities of bailiffs.

30. (1) The bailiff, acting under any writ of capias issued under this Part shall have authority and shall be bound to take bail by bond of the defendant and sureties to himself for the appearance and rendering of the body of the defendant according to the exigency of such writ and the practice of the said Court of the

Bailiffs to take bail.
Ibid. s. 11:

- S. 30.** same kind and in like manner in all respects as the sheriff is bound to take bail from a defendant arrested under an ordinary writ of capias issued out of the Court at Sydney directed to himself.

Release of
defendant
thereon.

(2) Such bailiff upon such bail bond being entered into and given to him shall release the defendant from his custody under such writ.

Bail bond
assignable.

(3) Every such bail bond shall be assignable by such bailiff to the plaintiff, and such bailiff upon being required so to do shall assign the same to the plaintiff, and the plaintiff upon such assignment thereof may sue thereon in like manner in all respects as if it were an ordinary bail bond to the sheriff.

Bailiffs to take
deposit in lieu
of bail.
24 Vic. No. 14,
s. 12.

31. (1) The bailiff acting under any writ of capias issued under this Part shall be bound to receive from the defendant as a deposit in lieu of bail the amount for which he is to be arrested or held to bail thereunder and the sum of ten pounds for costs in like manner as the sheriff is bound to do under an ordinary writ of capias issued out of the Court at Sydney directed to and executed by him.

Release of
defendant
thereon.

(2) Upon receipt of such deposit such bailiff shall release the defendant from his custody under such writ, and shall forthwith pay or cause to be paid over to the prothonotary of the Court the money so deposited by such defendant as aforesaid, to be held and disposed of by such prothonotary according to law.

Bailiff's fees.
Ibid s. 13.

32. Every bailiff serving any writ of summons or executing any writ of capias issued under this Part shall be entitled to the same fees, mileage, and other remuneration for everything done by him as such bailiff under the provisions of this Act as the sheriff and his bailiff are, or is, or may be entitled to for the same or similar acts done by them or either of them in serving or executing or otherwise in relation to any ordinary writ of summons or of capias issued out of the Court at Sydney or taking bail thereunder, and to no other payment or remuneration whatever.

Plaintiff and
bailiff to be
jointly and
severally liable
for misfeasance
of bailiff.
Ibid s. 14.

33. Every plaintiff obtaining any such writ of capias under this Part, and the bailiff to whom the same is directed, shall be jointly and severally liable to the defendant for any wrongful act or omission by such bailiff in or about the execution of such writ or incident thereto.

Proceedings in
actions
commenced by
writs under
this part.
Ibid s. 15.

34. All proceedings in any action commenced by any writ of summons and under any writ of capias issued under the provisions of this Part shall (except as herein otherwise directed) be taken and had in like manner as if such action had been commenced by ordinary writ of summons issued out of the Court at Sydney, and the Court and any Judge thereof shall have all such and the same powers to set aside any writ of summons or capias issued under the provisions hereof or the service of any writ of summons, or to discharge from custody any defendant arrested under any such writ of capias, and to order any bail bond given thereunder to be cancelled, and in every other respect as such Court or Judge has or may have in case of ordinary writs of summons or capias issued out of the Court at Sydney.

35. The Judges, or any two of them, may make all such rules as they think necessary or proper for carrying this Part of this Act into execution.

S. 35.

Judges to
make rules.
24 Vic. No. 14,
s. 16.

SCHEDULE.

Reference to Act.	Title.	Extent of repeal.
9 Geo. IV. No. 2	An Act for adopting a certain Act of Parliament passed in the seventh and eighth years of His Majesty King George the Fourth to regulate the practice of arrests.	The whole.
3 Vic. No. 15	An Act for abolishing arrest on mesne process in civil actions except in certain cases in New South Wales and the dependencies thereof.	The whole.
13 Vic. No. 12	An Act to prevent the escape from the Colony of fraudulent debtors.	The unrepealed portion.
24 Vic. No. 14	An Act to authorise the appointment of a commissioner to issue writs of summons and arrest at the port of New-castle.	The whole.
37 Vic. No. 11	An Act to amend the law of arrest and imprisonment on civil process.	The unrepealed portion except section 6.

S. 1.

CLAIMS AGAINST THE GOV- ERNMENT AND CROWN SUITS ACT 1897.

In his memorandum and certificate accompanying this Act when in Bill form the Commissioner for the Consolidation of the Statute Law, His Honor Judge Heydon, says "This Bill consolidates two Statutes,—

20 Vic. No. 3;

39 Vic. No. 38;

The wording of these Statutes is old-fashioned and verbose, and has been freely but carefully altered, amended, and simplified, with a great improvement in clearness, but, it is believed, without any change of meaning."

TABLE.

Showing how the sections of the Acts intended to be consolidated have been dealt with.

Section of Repealed Acts.	Section of Consolidated Act.	Remarks.
20 Vic. No. 3, s. 1	7, 9	
2	7, 8	
3	10	
39 Vic. No. 38, s. 1	.....	
2	3	
3	4	
4	5	
5	6	
6	7	
7	8	
8	10	
9	.....	

ACT No. XXX., 1897.

S. 1.

An Act for consolidating enactments relating to Claims against the Government and Crown Suits.
[Assented to, 6th December, 1897.]

BE it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and Legislative Assembly of New South Wales in Parliament assembled, and by the authority of the same, as follows :—

1. This Act may be cited as the "Claims against the Government and Crown Suits Act, 1897."

2. (I) The Acts mentioned in the Schedule to this Act are, to the extent therein expressed, hereby repealed.

Repeal.
Schedule.

(II) All rules of Court made under the authority of any Act hereby repealed, and being in force at the time of the passing of this Act shall be deemed to have been made under the authority of this Act.

Rules of Court under Acts hereby repealed.

3. (I) Any person having or deeming himself to have any just claim or demand whatever against the Government of New South Wales may set forth the same in a petition to the Governor praying him to appoint a nominal defendant in the matter of such petition, and the Governor may by notification in the Gazette appoint any person resident in New South Wales to be a nominal defendant accordingly.

Claimant may petition Governor.
39 Vic. No. 38, s. 2.
Governor may appoint nominal defendant.

(II) If within one month after presentation of such petition no such notification is made the Colonial Treasurer shall be the nominal defendant.

Any just claim or demand.—This includes actions for torts: *Wakely v. Lackey* (1880) 1 N.S.W.R. 274; *Bowman v. Farnell*, (1885) 7 N.S.W.R. 1; 2 W.N. 53; on appeal to P.C.: 8 N.S.W.R. 223; 4 W.N. 32.

The form of the petition may be as follows :—

To His Excellency (name and titles of the Governor of the State) Governor and Commander in-Chief of the State of New South Wales and its dependencies.

The Humble Petition of A. B. of (addition and address) sheweth

1. (Set out the cause of action strictly in paragraphs).

4. That your petitioner has and believes himself to have a just claim or demand against the Government of the said State in respect of the premises to the amount of £

Your Petitioner therefore prays that your Excellency may be pleased to appoint a nominal defendant in the matter of this petition under the Claims against the Government and Crown Suits Act, 1897.

And your Petitioner will ever pray, etc.

Dated this day of A.D. 190

Attorney for the said A. B.

4. The petitioner may sue such nominal defendant at law or in equity in any competent Court, and every such case shall be commenced in the same way, and the proceedings and rights of parties therein shall as nearly as possible be the same, and judgment and costs shall follow or may be awarded on either side as in an ordinary case between subject and subject.

Petitioner may sue as in ordinary cases. *Ibid.* s. 3.

S. 4.

Proceedings and rights of parties . . . shall as nearly as possible be the same, etc.—*Statute of Limitations*.—In an action brought against the Government for a breach of Statutory duty a plea of the Statute of Limitations was held to apply: *Elliott v. Baker*, (1880) 1 N.S.W.R. 296; *De Rossi v. Walker*, (1902) 2 S.R. 249; 19 W.N. 187.

Discovery.—In *Morrissey v. Young*, (1896) 17 N.S.W.R. Eq. 157; 12 W.N. 90, it was held, overruling *Anderson v. Stuart*, (1884) 1 W.N. 92, and the *Bank of N.S.W. v. Dibbs*, (1885) 2 W.N. 9, that under this Act, a nominal defendant will, in the proper case, be ordered to give discovery to the plaintiff both in Equity and at law.

Venue.—A nominal defendant, if sued in the District Court, can only be sued in the district in which he is resident. If such defendant is a Minister of the Crown, he must be sued at the place of his official residence, i.e., in Sydney as the seat of Government: *Boon v. Young*, (1895) 16 N.S.W.R. 139; 11 W.N. 163.

But the Government is not in respect of rights and duties put by this section in the same position as a private individual: *Davidson v. Walker*, (1901) 1 S.R. 196; 18 W.N. 276; *Gibson v. Young*, (1900) 21 N.S.W.R. 7; 16 W.N. 158; *Delacauw v. Fosbery*, (1896) 13 W.N. 49.

Limited liability of nominal defendant.

39 Vic. No. 38, s. 4.

5. The nominal defendant in any case under this Act shall not be individually liable in person or property by reason of his being such defendant.

See *Evans v. O'Connor*, (1891) 12 N.S.W.R. 81; 7 W.N. 130.

Nature of relief:

Ibid. s. 5.

6. In any action or suit under this Act all necessary judgments, decrees, and orders may be given and made, including every species of relief whether by way of—

- (a) specific performance; or
- (b) restitution of rights; or
- (c) recovery of lands or chattels; or
- (d) payment of money or damages.

Every species of relief.—In *Evans v. O'Connor*, (1891) 12 N.S.W.R. 81; 7 W.N. 130, it was held that an injunction could not be granted against a nominal defendant, in an action against the Government, under this Act. And in the same case, *Darley, C.J.*, said "I have very grave doubts whether any portion of the Common Law Procedure Acts apply to actions against the Government." But in *Morrissey v. Young*, (1896) 17 N.S.W.R. Eq. 157; 12 W.N. 90, it was held that a discovery order could be made in a proper case against a nominal defendant under this Act.

Costs in proceedings by Crown.

20 Vic. No. 3, ss. 1, 2.

39 Vic. No. 38, s. 6.

7. In any information, action, suit, or other proceeding by or on behalf of the Crown in respect of any property of the Crown, the proceeds, or rents, or profits whereof by any Act now in force or hereafter to be passed are to be carried to the consolidated revenue fund of New South Wales, or in respect of any money due to the Crown by virtue of any Act relating to the public revenue, costs shall follow or may be awarded as in an ordinary case between subject and subject.

Treasurer to pay damages, &c.

Ibid. s. 2.

Ibid. s. 7.

8. (I) The Colonial Treasurer shall pay—

- (a) all damages and costs adjudged against such nominal defendant; or
 - (b) costs awarded against the Crown or Attorney-General.
- out of any moneys in his hands then legally applicable thereto and forming part of or belonging to the consolidated revenue or voted by Parliament for that purpose.

Execution:

(II) In the event of such payment not being made within sixty days after demand, execution may be had for the amount and levied upon any property vested in the Government but not upon any property—

- (a) vested in the Government on behalf of the Imperial Government ; or **S. 8.**
 (b) to which the Imperial Government has any claim or is in anywise entitled.

9. Costs recovered by or on behalf of the Crown shall be paid into the Treasury and become part of the consolidated revenue. **Payment into Treasury. 20 Vic. No. 3, s. 1.**

10. (I) The Judges of the Supreme Court or any three of them may make general rules for carrying this Act into effect. **Rules. Ibid. s. 3.**

(II) Such rules shall not be inconsistent with this Act, and on being published in the Gazette shall have the force of law. **39 Vic. No. 38, s. 8.**

(III) Copies of all such rules shall be laid before both Houses of Parliament within seven days after publication thereof. or if Parliament be not sitting, then within seven days after the commencement of the next ensuing session.

(IV) If either House shall at any time by resolution disapprove of such rules, the rules so disapproved of shall on notification of such resolution to the Chief Justice cease and determine.

No special Rules seem to have been made under this Act.

SCHEDULE.

Reference to Act.	Title of Act.	Extent of Repeal.
20 Vic. No. 3	An Act for the payment of costs in proceedings instituted on behalf of the Crown in matters relating to the revenue, and for the amendment of the procedure and practice in Crown Suits.	The whole.
39 Vic. No. 38	Claims against the Colonial Government Act.	The whole.

S. 1.

THE EVIDENCE ACT 1898.

THIS Act consolidates the whole or portions of the following twenty-five Statutes :—

5 Vic. No. 9 ;
7 Vic. No. 16 ;
8 Vic. No. 1 ;
11 Vic. No. 38 ;
11 Vic. No. 46 ;
13 Vic. No. 16 ;
16 Vic. No. 14 ;
17 Vic. No. 39 ;
18 Vic. No. 13 ;
19 Vic. No. 30 ;
19 Vic. No. 34 ;
20 Vic. No. 31 ;
22 Vic. No. 7 ;
24 Vic. No. 16 ;
36 Vic. No. 9 ;
40 Vic. No. 8 ;
46 Vic. No. 3 ;
46 Vic. No. 17 ;
51 Vic. No. 19 ;
52 Vic. No. 14 ;
54 Vic. No. 25 ;
55 Vic. No. 4 ;
55 Vic. No. 5 ;
55 Vic. No. 30 ;
56 Vic. No. 36 ;

The statutory law of evidence is contained in a large number of Acts which amend, repeal, impliedly amend, impliedly repeal, vary, and overlie each other, and whose confused provisions it has been found a difficult and delicate task to reduce to a clear, simple, and orderly form, without running too great a risk of altering the law.

In consolidating not only what are properly known as the Evidence Acts, but also a number of sections relating to evidence taken from Acts dealing with other matters, it has not always been easy to decide whether a particular section should be taken or not. As a general rule the principle of selection adopted has been to take only those provisions which are of general application, and which are complete in themselves—*i.e.*, which do not require for their interpretation reference to any other Acts. Thus, when a section in any Act makes provisions as to evidence in proceedings under that Act, or as to the means of proving compliance with the requirements of that Act, it has been thought better not to deal with such a section in this Bill. In cases where there was any doubt as to the application of this principle, regard has been had to the question of practical convenience.—(*Commissioner's Note.*)

The Commissioner's notes on the different sections are inserted under each section.

TABLE

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Showing how the sections of the Acts consolidated have been dealt with.

Section of Repealed Acts.	Section of Consolidated Act.	Remarks.
5 Vic. No. 9, s. 25		Obsolete.
7 Vic. No. 16, s. 13	28, 29	Part of section already consolidated in Registration of Deeds Act, 1897.
24	28, 29	
30	28	
8 Vic. No. 1, s. 1	5	Spent.
2	.....	
11 Vic. No. 38, s. 1	26	As to application of fees, <i>see</i> Public Officers' Fees Act, 1896.
2	26	
11 Vic. No. 46, s. 3	33	
13 Vic. No. 16, s. 1	20	Unrepealed part to be dealt with in Criminal Law Bill.
2	15	
3	24	
4	18	
5	43	
16 Vic. No. 14, s. 1	5	Omitted as unnecessary. To be dealt with in Common Law Procedure Bill. To be dealt with in Criminal Law Bill. Unrepealed part to be dealt with in Criminal Law Bill. Date of commencement.
2	5, 6	
3	7, 9	
4	5	
5	.....	
6	.....	
7	17, 21	
8	23	
9	16	
10	.....	
11	43	
12	.....	
17 Vic. No. 39, s. 12	25	Unrepealed part to be dealt with in Justices Bill.
18 Vic. No. 13, s. 1	5, 6	
19 Vic. No. 30, s. 16	30	
19 Vic. No. 34, s. 10	30	Unrepealed part to be dealt with in another Bill.
19	30	Proviso omitted, as impliedly repealed by 55 Vic. No. 5, s. 8.
20 Vic. No. 31, s. 11	53	
12	54	
13	55	
14	35	
15	36	
22 Vic. No. 7, s. 1	4, 35, 36, 53,	Unrepealed part to be dealt with in Oaths Bill.
	54, 55	
2	5, 6	
3	7	

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Section of Repealed Acts.	Section of Consolidated Act.	Remarks.
22 Vic. No. 7, s. 4	11	
5	12	
6	34	
7	23	
8	23	
9	23	
10	.....	To be dealt with in Criminal Law Bill.
11	38	
12	.....	Omitted as unnecessary.
13	13	
14	13, 14	
24 Vic. No. 16, s. 1	.....	Repealing section.
2	.....	Saving clause.
3	.....	Short title.
36 Vic. No. 9, s. 11	5, 6	
13	5, 6	
14	5, 10	
37	8, 10	
40 Vic. No. 8, s. 1	5, 42	
46 Vic. No. 3, s. 1	5	
2	.....	Short title.
46 Vic. No. 17, s. 348	41	
350	55	
351	5	Unrepealed part to be dealt with in Criminal Law Bill.
352	37	
353	48	
354	5, 7, 31	
357	38	
358	23	
359	23	Unrepealed part to be dealt with in Supreme Court Bill.
360	35, 36	
361	39, 40	
442	23	Unrepealed part to be dealt with in Criminal Law Bill.
472	27	
51 Vic. No. 19, s. 146	22	
52 Vic. No. 14, s. 6	32	Unrepealed part to be dealt with in Companies Bill.
54 Vic. No. 25, s. 21	29	
55 Vic. No. 4, s. 1		Short title.
2	3, 52	
3	44	
4	45	
5	46	
6	47	
7	49	
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9	51	
55 Vic. No. 5, s. 6	5, 7	
8	30	
9	30	Unrepealed part to be dealt with in Criminal Law Bill.

S. 1.

Section of Repealed Acts.	Section of Consolidated Act.	Remarks.
55 Vic. No. 5, s. 10	32	
11	19	
55 Vic. No. 30, s. 23	5, 7	
56 Vic. No. 36, s. 9	5, 10	

ACT No. XI., 1898.

An Act to consolidate the statute law relating to Evidence. [Assented to, 27th July, 1898.]

BE it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and Legislative Assembly of New South Wales in Parliament assembled, and by the authority of the same, as follows :—

PART I.**PRELIMINARY.**

1. This Act may be cited as the "Evidence Act, 1898," and is divided into parts, as follows :—

Short title and division:

PART I.—PRELIMINARY—ss. 1–4.

PART II.—COMPETENCY AND COMPELLABILITY OF WITNESSES—ss. 5–14.

PART III.—MEANS OF PROOF AND ADMISSIBILITY OF EVIDENCE—ss. 15–43.

PART IV.—BANKERS' BOOKS—ss. 44–52.

PART V.—EXAMINATION AND CROSS-EXAMINATION OF WITNESSES—ss. 53–55.

2. The Acts mentioned in the Schedule to this Act are, to the extent therein expressed, hereby repealed :

Repeal: Schedule:

Provided that this repeal shall not render inadmissible in evidence any certificate, entry, copy, extract, or document in existence at the time of the passing of this Act, which would have been admissible in evidence under any Act hereby repealed.

Provided, etc.—The proviso is intended to meet cases which may possibly arise under (for example) the provisions relating to Port Phillip in 11 Vic. No. 38, s. 1; 13 Vic. No. 16, ss. 1, 3, etc. If a certificate, obtained before the separation of Victoria, is admissible in evidence under the present law, this clause will preserve the right.—(*Commissioner's Note.*)

3. In this Act, unless the context or subject-matter otherwise indicates or requires,—

Interpretation:

"Bank" or "banker" means—

55 Vic. No. 4, s. 2.

- (a) any person, partnership, or company engaged in the ordinary business of banking by receiving deposits and issuing bills or notes payable to the bearer at sight or on demand; and also

S. 3.

- (b) the Savings Bank of New South Wales ; and
 (c) any Government or Post Office Savings Bank, established under any law in force for the time being.

Expressions relating to "bankers' books" include ledgers, day-books, cash-books, and other account books used in the ordinary business of the bank.

"Court" means the Court, Judge, justice, arbitrator, or person before whom a legal proceeding is held or taken.

"Justice" means justice of the peace.

"Legal proceeding" means any civil or criminal proceeding or inquiry in which evidence is or may be given, and includes an arbitration.

This is taken principally from the Bankers' Books Evidence Act. The expressions "legal proceeding" and "Court" as defined here are substituted throughout the Act for expressions such as—

"The trial of any issue joined or any matter or question or inquiry arising in any suit, action, or other proceeding,"
 and

"any court of justice or any person having by law, or by consent of parties authority to hear, receive, and examine evidence." (*Commissioner's Note.*)

4. All the provisions of this Act, except where the contrary intention appears, shall apply to every legal proceeding.

PART II.

Competency.

COMPETENCY AND COMPELLABILITY OF WITNESSES.

8 Vic. No. 1, s. 1
 16 Vic. No. 14,
 ss. 1, 2, 4.

5. No person offered as a witness shall be incompetent to give evidence by reason of incapacity from crime or interest.

See also the Crimes Act 1900, ss. 407, 408.

18 Vic. No. 13,
 s. 1.
 22 Vic. No. 7,
 s. 2.

36 Vic. No. 9,
 ss. 11, 13, 14;
 46 Vic. No. 8,
 s. 1.

46 Vic. No. 3, s. 1
 46 Vic. No. 17,
 ss. 351, 354.

55 Vic. No. 5, s. 6
 55 Vic. No. 30,
 s. 23.

56 Vic. No. 36,
 s. 9.

This is considered to present the net result of the numerous sections noted in the margin. It is unnecessary here to trace these sections in detail, and to show how they have modified and affected each other. One troublesome question may, however, be mentioned. There is a doubt whether, under the terms of the 55 Vic. No. 5, s. 6, a person charged with an indictable offence, or the husband or wife of such person, is now competent to give evidence on the preliminary hearing before a magistrate. The point has never apparently been decided by any Court, but, as the safer course, the practice has been adopted of not allowing such evidence. The point is very arguable, but there seems no reason why an accused person should not have the right of at once calling all his evidence and telling his own story on oath, if he so wishes. By doing so he may, perhaps, prevent his trial by influencing the Attorney-General to file no bill. Instead of consolidating the doubt it has been resolved in favor of competency.—(*Commissioner's Note.*)

It has been decided that under this section an accused person is competent to give evidence on his own behalf : *Reg. v. White*, (1899) 20 N.S.W.R. 12 ; 15 W.N. 197.

Compellability.
 16 Vic. No. 14,
 s. 2.

18 Vic. No. 13,
 s. 1.
 22 Vic. No. 7,
 s. 2.

36 Vic. No. 9,
 ss. 11, 13.

6. In any legal proceeding in which witnesses are compellable to give evidence, every person offered as a witness and competent to give evidence shall, except as hereinafter provided, be compellable to give evidence.

Sections 6 and 7. Many difficult questions have arisen through the want of a uniform phraseology in the successive Acts dealing with the compellability of witnesses. Take, for example, the following classes of persons, all of whom were at common law incompetent—and a fortiori not compellable—to give evidence :—

- | | | |
|---|---|--------------|
| A. A person not a party to the proceedings but interested in the result | "may and shall be <i>admitted</i> " to give evidence.
(8 Vic. No. 1, s. 1.) | S. 6. |
| B. A convict undergoing sentence | "may and shall be <i>admitted</i> " to give evidence.
(8 Vic. No. 1, s. 1.) | |
| C. A party to an action for breach of promise of marriage | "shall be <i>competent</i> " to give evidence
(40 Vic. No. 8, s. 1.) | |
| D. A person charged with an offence punishable on summary conviction. | "It shall be <i>lawful</i> " for him to give evidence.
(46 Vic. No. 3, s. 1.) | |
| E. A person charged with an indictable offence | "shall be <i>competent but not compellable</i> to give evidence."
(55 Vic. No. 5, s. 6.) | |

Are A, B, C, and D all, or is any of them, compellable to give evidence? Does "admitted" mean the same as "competent" and does either, or do both, of them mean the same as "lawful"? It may be mentioned that C, D, and E, were all in terms excepted from the provisions of 16 Vic. No. 14, making parties "competent and compellable" to give evidence. Unless some distinction is drawn between the expressions used as to A and D, then either a person can refuse to give evidence in an action in the result of which he is interested, or a person charged with a non-indictable offence can be compelled to give evidence on his trial. It has been decided, as to A and B, that "admitted" means "competent and compellable"; as to C, that "competent" means "competent and compellable"; and as to D, that "lawful" means "competent" but not "compellable."—(*Commissioners' Note*.)

In the case of *In re Carroll*, (1862) 1 S.C.R. 306, it was held that the defendant in an affiliation case is compellable to answer whether or no he is the father of the child.

A judge presiding at a criminal trial may refuse to compel a witness under cross-examination to answer Yes or No to a question: *Reg. v. O'Brien*, (1878) 1 S.C.R.N.S. 146.

7. No accused person in a criminal proceeding, or husband or wife of any such accused, shall be compellable to give evidence in such proceeding.

No accused person in a criminal proceeding charged with an indictable offence shall be liable—

- (a) to be called as a witness on behalf of the prosecution; or
- (b) to be questioned on cross-examination as to his previous character or antecedents without the leave of the Judge:

Provided that this section shall not apply to any person who, but for this Act, would be at common law or by any Act or Imperial Act compellable to give evidence in such proceeding.

See Commissioner's note, s. 6.

This section, together with sections 27, 31, 37, 38, 39, 40, 41, and 48, has been repealed and re-enacted by the Crimes Act 1900. For notes on these sections and numerous cases which have been decided on their provisions, see *The Crimes Act of 1900*, edited by Messrs. Hamilton & Addison, Barristers-at-law.

Provided, etc.—See for example, the Deserted Wives and Children's Act, 22 Vic. No. 6, s. 8, (now 1901, No. 17) and the Customs Regulation Act, 42 Vic. No. 19, s. 192.

8. In any legal proceeding in the Supreme Court in its matrimonial causes jurisdiction the Court may order the attendance of the petitioner, and may examine him or her, or permit him or her to be examined or cross-examined on oath on the hearing of the petition.

Sections 8 and 10. In the Matrimonial Causes Jurisdiction, the matter is further complicated. Under the law as it stood at the time of the establishment of this jurisdiction in New South Wales, the parties to all legal proceedings were competent and compellable witnesses, except

Defendants in criminal proceedings and their husbands or wives.

16 Vic. No. 14, s. 3.
22 Vic. No. 7, s. 3.
46 Vic. No. 17, s. 354.
55 Vic. No. 5, s. 6.
55 Vic. No. 30, s. 23.

Parties to matrimonial suits.
36 Vic. No. 9, s. 37.

S. 8.

1. Defendants in criminal proceedings,
2. Parties to proceedings instituted in consequence of adultery,
3. Parties to actions for breach of promise of marriage.

The Matrimonial Causes Act, 36 Vic. No. 9, s. 13, repealed the exception as to proceedings in consequence of adultery. This would clearly have made the parties in all matrimonial suits competent and compellable witnesses; but in the same Act it was provided

- (a) by sec. 11—that in suits by the wife for judicial separation on grounds of adultery, or cruelty, or desertion, the parties should be competent and compellable witnesses as to such cruelty or desertion;
- (b) by sec. 14—that the parties to any proceedings under the Act should be competent witnesses;
- (c) by sec. 37—that the Court might order the attendance of the petitioner for examination or cross-examination.

These provisions were taken from various English Acts, passed at different times, where they stood as successive modifications of the common law rule of the incompetency of parties. By throwing them together, higgledy-piggledy, into one measure, a new difficulty was added to their interpretation. After much consideration the question was resolved in favour of compellability, which appears to accord with the law as it now is in England.—(*Commissioner's Note*.)

Questions
tending to
criminate.

16 Vic. No. 14,
s. 3.

Questions
tending to
show adultery.

36 Vic. No. 9,
ss. 14, 37.

56 Vic. No. 36,
s. 9.

9. Nothing in this Act shall render any person compellable to answer any question tending to criminate himself.

10. No witness in any proceeding in the Supreme Court in its matrimonial causes jurisdiction, whether a party to the suit or not, shall be liable to be asked or bound to answer any question tending to show that he has been guilty of adultery, unless he has already given evidence in the same proceeding in disproof of his alleged adultery.

See note to section 8, (*ante*).

A respondent having admitted the adultery charged, cannot be asked, in cross-examination, questions which would under s. 79 of the Matrimonial Causes Act 1899, have been inadmissible if no such admission had been made. Counsel is at liberty to draw the attention of the witness to the fact that he may claim the protection afforded by that section: *Wallis v. Wallis and Chapman*, (1890) 12 N.S.W.R. Divorce 1; 7 W.N. 22. 120.

Communica-
tions during
marriage.

22 Vic. No. 7,
s. 4.

11. No husband shall be competent to disclose any communication made to him by his wife during the marriage, and no wife shall be competent to disclose any communication made to her by her husband during the marriage:

Jones v. Jones,
7 N.S.W.R.
(Div.) 9.

Provided that this section shall not apply, in any proceeding in the Supreme Court in its matrimonial causes jurisdiction, to any husband and wife who are both parties to such proceeding.

Section 11. "or compellable" is omitted after "competent" as superfluous. As to the proviso, see the case of *Jones v. Jones*, 7 N.S.W.R. (Div.) 9. Under the English Act 16 and 17 Vic., c. 83, s. 3, husbands and wives are competent but not compellable. The question to be considered under this clause was how far, if at all, the provisions of the 22 Vic. No. 7, s. 4, that husbands and wives cannot disclose communications during marriage, have been impliedly repealed by the later Acts. It seemed clear that in matrimonial causes the husband and wife could, when they were hostile parties, disclose communications made to one another, and this appears to have been the invariable practice in the Matrimonial Causes Court. But where they are not hostile parties the prohibition would appear to be still in force, e.g., the wife of a co-respondent could not be called to testify to communications made to her by him. Except in matrimonial causes no reason could be found for deciding that this statutory provision had ceased in any way to be effective.—(*Commissioner's Note*.)

12. Any person present at any legal proceeding wherein he might have been compellable to give evidence and produce documents by virtue of a subpoena or other summons or order duly issued and served for that purpose shall be compellable to give evidence and produce documents then in his possession and power in the same manner, and in case of refusal shall be subject to the same penalties and liabilities as if he had been duly subpoenaed or summoned for that purpose. **S. 12.**

Persons may be examined without a subpoena.
22 Vic. No. 7, s. 5.

13. (1) Where any person duly bound by recognisance or served with a subpoena to attend in any Court as a witness at the trial of any case, civil or criminal, fails to appear when called in open Court either at such trial or upon the day appointed for such trial, the Court may—

Witnesses failing to attend trial.
Ibid. s. 13.

- (a) upon proof of such recognisance or of his having been duly served with such subpoena, call upon him to show cause why execution upon such recognisance or an attachment for disobedience to such subpoena should not be issued against him ; or
- (b) upon proof of such recognisance or service, and also that his non-appearance is without just cause or reasonable excuse, and upon oath that he will probably be able to give material evidence, issue a warrant to bring him before the Court to give evidence at such trial.

(2) Such proof may be oral before the Court or by affidavit. *Ibid.* s. 14.

An attorney acting as counsel for his client applied to a judge for a bench warrant to arrest an absent witness, and gave evidence on oath, to support the application that the witness had been duly served with a subpoena. In an action for procuring the arrest of the witness by falsely and maliciously and without reasonable and probable cause swearing that he had been duly served, *held* (on demurrer) that the attorney was liable to an action for maliciously procuring the arrest : *Dunshea v. Ryan*, (1901) 1 S.R. 163 ; 18 W.N. 181.

- 14. (1)** Every rule or order to show cause as aforesaid may
- (a) be made returnable before the Court itself at the then sittings or at some future sitting ; or
 - (b) in respect of the non-appearance of a witness at a circuit court or on the trial of a case pending in the Supreme Court, be made returnable in the Supreme Court.

Procedure.
Ibid.

(2) On the return of any such rule or order the Court may deal with the case as the Supreme Court might and would have done upon a rule to the like effect issued out of that Court.

PART III.

MEANS OF PROOF AND ADMISSIBILITY OF EVIDENCE.

15. Whenever by this or any other Act now or hereafter in force—

- (a) any certificate ; or
- (b) any official or public document ; or
- (c) any document or proceeding of any corporation or joint stock or other company ; or

Proof of seal, signature, and official character dispensed with:
13 Vic. No. 16, s. 2.

- S. 16.** (d) any copy of or extract from any document, or by-law, or entry in any register or other book, or of or from any other proceeding,

is admissible in evidence of any particular in any legal proceeding, a document purporting to be such certificate, document, proceeding, copy, or extract shall be admitted in evidence, if it purports to be certified or sealed, or impressed with a stamp, or sealed and signed, or signed alone, or impressed with a stamp and signed, as directed by such Act, without any proof—

- (e) of the seal or stamp, where a seal or stamp is necessary ; or
 - (f) of the signature ; or
 - (g) of the official character of the person appearing to have signed the same,
- and without any further proof thereof.

See also the (Commonwealth) State Laws and Records Recognition Act, 1901 (*post*).

Section 15. The present section was originally copied from an English Act, and by an obvious inadvertence the words "or sealed and signed, or signed alone as required or impressed with a stamp" were omitted by the copyist. They have been restored in the clause, omitting only "as required." Some alterations have been made in this clause, which require careful consideration in connection with the later clauses more particularly effected by it. By its aid the phrase, so continually repeated, "purporting to be," has been almost entirely dispensed with. Some doubt was felt whether these words could safely be omitted from clauses 17, 21, and 22, but this was dispelled by a consideration of the use of the word "document" in sec. 7 of 16 Vic. No. 14.—(*Commissioner's Note*.)

Public books
and documents.
16 Vic. No. 14,
s. 9.

16. (1) Whenever any book or other document is of such a public nature as to be admissible in evidence on its mere production from the proper custody, and no Act exists which renders its contents provable by means of a copy, a copy thereof or extract therefrom shall be admissible in evidence, if it is—

- (a) proved to be an examined copy or extract ; or
- (b) certified under the hand of the officer to whose custody the original is entrusted.

(2) Such officer shall furnish such certified copy or extract to any person applying at a reasonable time for the same upon payment of a reasonable sum for the same not exceeding fourpence for every folio of ninety words.

Certified under the hand of—This phrase is uniformly used through the Act in substitution for various equivalent expressions.—(*Commissioner's Note*.)

In *Liddell v. Harpur*, (1874) 13 S.C.R. 129, it was held that an application in writing under the 13th section of the Crown Lands Alienation Act of 1861 is not a document of such a public nature as to be admissible in evidence on its mere production within the meaning of this section.

Also that entries in books kept by a land agent were properly admitted, as they were entries made by a public officer under the direction of a Statute.

Acts of State
Ibid. s. 7..

17. Evidence of any proclamation, treaty, or other Act of State of any part of the British dominions, or of any foreign State, may be given by the production of a copy thereof, either—

- (a) proved to be an examined copy thereof ; or
- (b) sealed with the seal of such part of the British dominions or of such foreign State.

Sections 17, 19, 21. The expressions "British dominions" and "out of New South Wales" are more comprehensive than those used at present, and remove some anomalies.—(*Commissioner's Note*.)

There was nothing in 16 Vic. No. 14, (consolidated by this Statute) enabling a foreign Statute to be put in evidence : *Graham v. Proudfoot*, (1885) 2 W.N. 109 ; but see s. 19 (*post*).

S. 17.

Treaty.—The Court can take judicial notice of the Extradition Treaty between England and the United States of America : *Reg. v. Butler*, (1897) 18 N.S.W.R. 146.

18. Evidence of—

- (a) any private Act ; or
- (b) any proclamation or commission issued by the Governor, may be given by the production of a document purporting to be a copy thereof, and purporting to be printed by the Government Printer, or by the authority of the Government.

Private Acts, proclamations, and commissions.
13 Vic. No. 16, s. 4.

In this section and throughout the Act, "*prima facie*" has been omitted as superfluous.—(*Commissioner's Note*.)

19. (1) Evidence of any Statute, code, or other written law of any part of the British dominions other than New South Wales, or of any foreign State, may be given by the production of a printed copy in a volume of such statute, code, or law, either—

Foreign law.
55 Vic. No. 5, s. 11.

- (a) purporting to be published by the authority of the Government of such part of the said dominions, or of such State ; or
- (b) proved to the satisfaction of the Court to be commonly admitted as evidence in the Courts and judicial tribunals of such part of the said dominions, or of such State.

(2) Evidence of the unwritten or common law of any such part of the said dominions, or any such State, may be given by the production of a book of reports of cases adjudged in the Courts thereof, purporting or proved to the satisfaction of the Court to be authorised reports.

Evidence of any Statute, etc.—Foreign Statute law may be proved in the Courts of New South Wales by putting in evidence a printed copy of the foreign Statute as provided by this section, but the construction of a Statute so put in evidence is for the Court to decide ; this section does not authorise the putting in evidence of books of reported decisions of foreign countries to show what interpretations judges in those countries have put upon their own Statutes : *Homeward Bound G. M. Co. v. McPherson*, (1896) 17 N.S.W.R. Eq. 281. In the case of *Reg. v. McLeod*, (1890) 11 N.S.W.R. 218, certain verified copies of documents and certificates obtained from America were received in evidence, but no evidence given of the American law of registration or of the admissibility of such documents in American Courts. It was held that, though these documents were wrongly received in evidence, yet, the marriage having been otherwise conclusively proved, the improper reception of the documents did not avoid the conviction.

Unwritten or Common Law—The common law of New Zealand is presumed to be the same as the Common Law of England, and any difference should be alleged in the pleading : *Proudfoot v. Drake*, (1882) 3 N.S.W.R. 381 ; so also where an action is brought upon a note payable in Queensland, and endorsed in New South Wales, it lies upon the defendant to show that the law of Queensland differs from the law of New South Wales : *Wright Heaton & Co. v. Barrett*, (1892) 13 N.S.W.R. 206 ; 9 W.N. 13.

20. (1) Evidence of any judgment, decree, rule, order, or other judicial proceeding of the Supreme Court or a Judge thereof in any jurisdiction may be given by the production of a copy thereof certified under the hand of the proper officer of such Court in such jurisdiction.

Judgments, &c., of Supreme Court.
13 Vic. No. 16, s. 1.

(2) The proper officer within the meaning of this section—

- S. 20.**
- (a) in the equitable jurisdiction of such Court is the master or deputy registrar in equity ;
 - (b) in the bankruptcy jurisdiction of such Court is the registrar or chief clerk in bankruptcy ;
 - (c) in the matrimonial causes jurisdiction of such Court is the registrar or deputy registrar in divorce ;
 - (d) in the probate jurisdiction of such Court is the registrar or deputy registrar of probates ; and
 - (e) in every other case is the prothonotary or chief clerk of such Court.

This section has been extended to the more recently created jurisdictions of the Court, and some consequential alterations have been made, and the phraseology of this and the next section has been made more uniform.—(*Commissioner's Note.*)

British,
colonial, and
foreign Courts.
16 Vic. No. 14,
s. 7.

21. Evidence of—

- (a) any judgment, decree, rule, order, or other judicial proceeding of any Court of justice out of New South Wales ;
or
- (b) any affidavit, pleading, or other legal document filed or deposited in any such Court,

may be given by the production of a copy thereof—

- (c) proved to be an examined copy thereof ; or
- (d) sealed with the seal of such Court ; or
- (e) signed by a Judge of such Court, with a statement in writing attached by him to his signature on such copy that such Court has no seal, and without any proof of his judicial character or of the truth of such statement.

See *E. S. & A. Bank v. Brown*, (1897) 14 W.N. 49, where what purported to be a copy of an order of the Supreme Court of Judicature in England was refused admission. A document must purport to be sealed with the seal of the Court before it can be admitted.

The Court will not recognise any Probate or Letters of Administration except those issued by themselves : *Arnott v. Chapman*, (1884) 5 N.S.W.R. Eq. 66.

The Insolvency Court being a Court of Record, it was held, in the case of *Reg. v. Goldberg*, (1887) 8 N.S.W.R. 504, not necessary for the Chief Commissioner to sign the order absolute for sequestration ; the paper purporting to be the order absolute was held to be a proper record of such order.

Proceedings in
bankruptcy.
51 Vic. No. 19,
s. 146.

- 22.**
- (a) Any petition or copy of a petition in bankruptcy ; or
 - (b) any order or certificate or copy of an order or certificate made by any Court having jurisdiction in bankruptcy ; or
 - (c) any instrument or copy of an instrument, affidavit, or document made or used in the course of any bankruptcy proceeding, or other proceedings had under the Bankruptcy Act 1887, or any Act amending the same,
shall be admissible in evidence if it is
 - (d) sealed with the seal of any Court having jurisdiction in bankruptcy ; or
 - (e) signed by any Judge thereof ; or
 - (f) certified under the hand of any Registrar thereof.

23. (1) Where it is necessary to prove any of the following facts— **S. 23.**

- (a) the conviction or acquittal before or by any Court or Judge or justice of any person charged with any offence ; or
- (b) that any person was sentenced to any punishment or pecuniary fine by any Court or Judge or justice ; or
- (c) that any person was ordered by any Court or Judge or justice to pay any sum of money ; or
- (d) the pendency or existence at any time before any Court, Judge, justice, or other official person, of any suit, action, trial, proceeding, inquiry, charge, or matter, civil or criminal,

Convictions, acquittals, and other judicial proceedings.

16 Vic. No. 14, s. 8.

22 Vic. No. 7, ss. 7, 8, 9.

46 Vic. No. 17, ss. 358, 359, 442

evidence of such fact may be given by the production of a certificate under the hand of—

- (e) any such Judge or justice or official person ; or
- (f) the clerk of such Court ; or
- (g) the officer having ordinarily the custody of the records, or documents, or proceedings, or minutes of such Court or Judge or justice ; or
- (h) the officer having ordinarily the custody of the records of a Court of Quarter Sessions, in the case of any conviction which has been transmitted by any justices to such Court ; or
- (i) the deputy of such clerk or officer,

showing such fact, or purporting to contain the substance, omitting the formal parts, of the record, indictment, conviction, acquittal, sentence, or order, or of the proceeding, inquiry, charge, or matter in question.

Provided that the time and place of such conviction, acquittal, sentence, or order, or of such suit, action, trial, proceeding, inquiry, charge, or matter are stated in such certificate, with the title of such Court or the name of the Judge or justice or official person before or by whom it was had, or passed, or made, or pending, or existing.

(2) During the sitting of any Circuit Court, the Judge's associate, or other officer there acting as clerk of assize, shall, in respect of all proceedings at such sitting, be deemed for the purposes of this section to be the officer having ordinarily the custody of the records of such Court.

(3) Any such certificate, stating that the person signing the same has ordinarily the custody of the records, or documents, or proceedings, or minutes referred to therein, shall be evidence of that fact.

(4) Any such certificate showing such conviction, acquittal, sentence, or order shall also be evidence of the particular offence or matter in respect of which the same was had, or passed, or made, if stated in such certificate.

(5) Any such certificate showing the pendency or existence of any such suit, action, trial, proceeding, inquiry,

S. 23. charge, or matter shall also be evidence of the particular nature and occasion or ground and cause thereof, if stated in such certificate.

(6) Any such certificate purporting to contain the substance, omitting the formal parts, of any record, indictment, conviction, acquittal, sentence, or order, or of any proceeding, inquiry, charge, or matter as aforesaid, shall also be evidence of the matters stated in such certificate.

Presumption as to summary convictions.

46 Vic. No 17, s. 358.

(7) Every summary conviction shall be presumed not to have been appealed from until the contrary is shown.

"Pendency . . . of any suit, action, trial, etc.—For what is sufficient evidence in a perjury case of pendency of a proceeding see *Reg. v. Cohen*, (1864) 3 S.C.R. 348; see also *Reg. v. Shanlank*, (1869) 8 S.C.R. 301; and *Reg. v. Dwyer*, (1872) 10 S.C.R. 12, where it was held that in a perjury trial pendency of a charge may be shown by parol evidence.

In an information for perjury committed on a trial at the Circuit Court at Goulburn, a certificate of the information and trial by "D. B. H. Prothonotary of the Supreme Court of New South Wales, the officer having ordinarily the custody of the records, etc., in the said Supreme Court," was held not to be sufficient evidence of the trial of such information at the Circuit Court of Goulburn, because it did not appear on the face of the certificate that D. B. H. was the officer having the custody of the records of the Circuit Court. The defect in this certificate might have been cured by proof that D. B. H. was the officer having the custody of such records: *Reg. v. West*, (1863) 2 S.C.R. 69.

Signatures of judges and officers of Supreme Court.

13 Vic. No. 16, s. 3.

24. Judicial notice shall be taken of the signature of—

- (a) any Judge of the Supreme Court; or
- (b) the prothonotary or chief clerk of such Court; or
- (c) the master or deputy registrar in equity; or
- (d) the registrar or chief clerk in bankruptcy; or
- (e) the registrar or deputy registrar in divorce; or
- (f) the registrar or deputy registrar of probates:

Provided such signature purports to be attached or appended to any decree, order, certificate, or other judicial or official document.

The provisions of 13 Vic. No. 16, s. 3, are in this section extended to every jurisdiction of the Court, and the respective registrars and deputy-registrars have been taken to stand in positions corresponding to those of the prothonotary and chief clerk.—(*Commissioner's Note*.)

Justices of the peace.

17 Vic. No. 39, s. 12.

25. The words "justice of the peace" or the letters "J.P." after the signature to any magisterial act shall be evidence that the person whose signature it purports to be is in fact a justice of the peace.

Letters patent and Crown grants.

11 Vic. No. 38, preamble and s. 1.

26. (1) Every entry or copy—

- (a) kept as of record or for public or official purposes in the office of the Colonial Secretary or of the Registrar-General; and
- (b) purporting to be an entry or copy of any letters patent or deed of grant from the Crown by which any land in New South Wales has been granted to any person for any estate or interest,

shall, if such letters patent or deed of grant be not produced in evidence, be deemed and taken to be of the same force and effect as the original letters patent or deed of grant under the seal of the Colony duly recorded and signed by the Governor.

(2) A copy of any such entry or copy, certified under the hand of the Colonial Secretary or the Registrar-General, shall have the same force and effect for the purposes of evidence to all intents and purposes whatsoever as if the original letters patent or deed of grant had been produced in evidence.

S. 26.

(3) For every such certified copy, a fee at the rate of one shilling and threepence for every folio of seventy two words shall be charged previously to the delivery of the same. 11 Vic. No. 38, preamble and s. 2.

(1) The wording in (b) departs a little from that of the original section, and follows that of the preamble, which seems to mean the same but is more specific and clear. No attempt has been made to decide whether "letters patent" means only letters referring to land.

(2) The words "upon proof made that such certificate has been signed" &c., have been omitted, it appearing clear that a certified copy of an entry or copy of letters patent, or a deed of grant is a certified copy of a "document" or "entry in a register or other book" in sec. 2 of 13 Vic. No. 16.—(*Commissioner's Note*).

27. Where by any Act, power to make by-laws or regulations is conferred upon any person or body, any printed paper purporting to be such by-laws or regulations, and to be printed by the Government Printer, shall in any criminal proceeding be evidence— By-laws and regulations. 46 Vic. No. 17, s. 472.

(a) that by-laws or regulations in the words printed in such paper were duly made by such person or body; and

(b) that such by-laws or regulations have been approved of or confirmed by the Governor, if they appear by such paper to have been so approved of or confirmed.

This has reluctantly been limited to criminal proceedings, because the Act from which it is taken was purely a Criminal Law Amendment Act. The same remark applies to clauses 41 (1) and 48.—(*Commissioner's Note*).

This section is repealed and re-enacted by the Crimes Act 1900.

28. (1) Secondary evidence of any deed registered in the office of the Registrar-General under the provisions of any Act may be given by the production of— Registered deeds, memorials, and wills 7 Vic. No. 16, ss. 13, 24, 30.

(a) the certified copy of such deed filed in such office, if produced by the Registrar-General or deputy registrar, or any clerk in such office appointed by the Registrar-General for that purpose; or

(b) an office copy of such certified copy, if reasonable notice in writing has been given to the adverse party by the party producing the same.

(2) Evidence of the contents of any memorial of a deed so registered in such office may be given by the production of an office copy of such memorial, if such notice as aforesaid has been given.

(b) "or his attorney" has been omitted as superfluous.—(*Commissioner's Note*).

A bare memorial of lease and release in the form prescribed by 6 Geo. IV, No. 22. (an old Registration Act now repealed) is not evidence of the contents of the original deed, nor does it amount to an admission of the contents of the deed by the person who executed it: *Stephen v. Roberts*, (1890) 11 N.S.W.R. Eq. 127.

29. (1) The probate of any will or letters of administration with the will annexed shall be evidence of the due execution of such will upon all questions concerning real estate in the same manner and to the same extent as heretofore concerning personal estate. Probate and letters of administration. Ibid. ss. 13, 24. 54 Vic. No. 25, s. 1, 21.

S. 29.

(2) The copy attached or annexed to such probate or letters of administration, purporting to be a copy of such will, shall be evidence of the contents of such will.

(3) Where any will has been registered in the office of the Registrar-General under the provisions of any Act, the certified copy of such will filed in such office, if produced by the Registrar-General or deputy registrar, or any clerk in such office appointed by the Registrar-General for that purpose, shall be secondary evidence of the contents of such will.

(4) The probate of any will or letters of administration shall be evidence of the death and the date of the death of the testator or intestate.

(5) In this section, the expression "probate of any will or letters of administration" includes—

- (a) an exemplification of probate or of letters of administration; and
- (b) any document accepted as sufficient in lieu of such exemplification by the Supreme Court in its probate jurisdiction, or by the Probate Judge under any law for the time being; and
- (c) an order to collect granted to the curator of intestate estates.

The Court will not recognise any Probate or Letters of Administration except those issued by themselves: *Arnott v. Chapman*, (1884) 5 N.S.W.R. Eq. 66.

Births, marriages, and deaths.

19 Vic. No. 30, s. 16.

19 Vic. No. 34, ss. 10, 19.

55 Vic. No. 5, s. 8.

30. (1) (a) A copy of a register, or of an entry in a register, certified under the hand of the Registrar-General or any deputy or district registrar; or

(b) a certificate under the hand of such Registrar-General or deputy or district registrar, and sealed or stamped with the seal or stamp of his office,

relating to any birth, marriage, or death; shall be evidence—

- (c) of the fact of such birth, marriage, or death; and
- (d) of the particulars contained in such copy or certificate respecting such birth, marriage or death; and
- (e) in the case of a marriage, that it has been duly celebrated.

Ibid; s. 9:

(2) A certificate of the birth, marriage, or death of any person in any part of the British dominions other than New South Wales, if it purport to be issued by the officer authorised by the law in that behalf of such part of the said dominions, shall be evidence of the matters stated in such certificate, without proof of the seal or stamp or signature, or of the official character of the person appearing to have signed the same.

Lost and destroyed registers
19 Vic. No. 34, s. 10.

(3) A certificate under the hand of the Registrar-General that any original register of births, marriages, or deaths for any specified period and for any particular district is lost or destroyed shall be conclusive evidence of that fact.

The proviso to s. 19 of 19 Vic. No. 34 has been treated as being impliedly repealed by 55 Vic. No. 5, s. 8. In other respects this section blends four sections and tries to correct their overlappings and inconsistencies.—(*Commissioner's Note*.)

See now the (Commonwealth) State Laws and Records Recognition Act, 1901 (*post*).

In a case of bigamy, in order to prove a marriage in Queensland, a copy of the marriage certificate, under the hand of the Registrar-General of Queensland, was on proof of his signature, held to be rightly admitted: *Reg. v. Davis*, (1880) 1 N.S.W.R. 110. But in *Reg. v. Hanlon*, (1893) 14 N.S.W.R. 312; 10 W.N. 35, a Queensland certificate of birth purporting to be issued by a District Registrar, but not stating on its face that it was issued by a person authorised by the law of Queensland to issue such certificates, was held not to be admissible in evidence under s. 9 of 55 Vic. No. 5, unless it was proved that by the law of Queensland a District Registrar was a person authorised to issue such certificates.

See also on this point *Semmens v. Semmens*, (1892) 9 W.N. 42.

31. On the prosecution of a person for bigamy, the first marriage shall not be proved by the evidence of the wife or husband of such marriage alone.

S. 30.

Bigamy.

46 Vic. No. 17,
s. 354.

Repealed and re-enacted by the Crimes Act 1900.

32. (1) Evidence of the incorporation or registration of any trading society or company, whether foreign or otherwise, may be given by proof that such society or company carried on business within New South Wales or elsewhere, as the case may be, under a certain name or style.

Companies,
incorporation,
registration, &c.
56 Vic. No. 5,
s. 10.

(2) Any copy of or extract from any document kept and registered at any office for the registration of joint stock companies in England, Scotland, or Ireland, or in any of the Australasian Colonies, certified under the hand of the registrar or an assistant registrar, shall be evidence of equal validity with the original document.

52 Vic. No. 14,
s. 6.

See also the (Commonwealth) State Laws and Records Recognition Act, 1901 (*post*).

"Australian" has been altered to "Australasian"—(*Commissioner's Note*.)

33. When any ship or vessel has been arrested under any process issuing out of the Vice-Admiralty Court, a copy proved to be a true copy of—

Ship's articles
and register.11 Vic. No. 46,
s. 3.

(a) the ship's articles of such ship or vessel and the signatures thereto; or of

(b) the register of such ship or vessel

shall be evidence in any legal proceeding of the contents of such articles and the signatures thereto, or of such register, as the case may be.

This has been treated as applicable to all Courts.—(*Commissioner's Note*.)

34. When any writing has been copied by means of any machine or press which produces a fac-simile impression or copy of such writing, such impression or copy shall, upon proof to the satisfaction of the Court that the same was taken or made from the original writing by means of such machine or press as aforesaid, be evidence of such writing without any proof that such impression or copy was compared with the said original, and without any notice to produce such original.

Machine copies.
22 Vic. No. 7,
s. 6.

35. It shall not be necessary to prove by the attesting witness any instrument to the validity of which attestation is not requisite. Such instrument may be proved by admission or otherwise as if there had been no attesting witness thereto.

Attesting
witnesses.20 Vic. No. 31,
s. 14.22 Vic. No. 7,
s. 1.

Where attestation is necessary to the validity of an instrument, the witness must be called, or his absence accounted for, and his signature proved: *Bowman v. Hodgson*,

46 Vic. No. 17,
s. 360.

- S. 35.** L.R. 1 P. & M. 362; unless the instrument proves itself by age and proper custody as to which, see Roscoe's N.P. Evid., 16th ed., pp. 131 *et seq.*, and *Mytton v. Thornbury*, 29 L.J. M.C. 109, Q.B.

As to who is an attesting witness, see the observations of *Erle, C.J.*, in *Deffell v. White*, L.R. 2 C.P. 144.

The instruments to the validity of which attestation is requisite, may be divided into two classes; first, instruments which the parties themselves, or those under whom they claim or act, have stipulated shall require one or more attesting witnesses; and secondly, instruments which require attestation under some statutory provision.

Even in these cases, the necessity for calling the attesting witness only arises where it is necessary to *prove* the instrument. For the parties against whom any of these instruments requiring attestation are sought to be used, may waive the necessity for calling the attesting witness, by admissions. Thus, if in the course of the proceedings in the cause, the party voluntarily admits the execution, or if by his pleadings he does not require the execution to be proved, there is no necessity for calling the attesting witness. But where *proof* has to be given of attestation, the necessity for calling the attesting witness cannot be avoided by putting the party to the deed, and against whom it is sought to be used, into the witness box, and extracting an admission of the execution from him: *Whyman v. Garth*, 8 Exch. 803.

36. Where any writing or signature is in dispute, the same may be compared with any other writing or signature, proved to the satisfaction of the Court to be genuine; and such last-mentioned writing or signature, together with the evidence of witnesses respecting the same shall be evidence of the genuineness or otherwise of the writing or signature in dispute.

This section allows documents proved to be genuine but not relevant to the issue, to be put in for the purpose of comparison: *Birch v. Ridgway*, 1 F. & F. 270; *Cresswell v. Jackson*, 2 F. & F. 24. *Semle* in an action by indorsee against acceptor of a bill of exchange, where acceptor denies the indorsement of the drawer, such indorsement may be proved under this section by comparison with the signature of the drawer upon the bill, which the acceptor is estopped from denying.

If the genuineness of the document sought to be put in is disputed, a collateral question is raised which must first be decided: *Cooper v. Dawson*, 1 F. & F. 550; like all other collateral issues by the judge: *Bartlett v. Smith*, 11 M. & W. 483; *Boyle v. Wiseman*, 24 L.J. Ex. 284.

For the purpose of comparison under this section, the disputed writing must be produced in Court; and this section does not therefore apply to documents which are not produced, and of which it is sought to give secondary evidence: *Arbon v. Fussell*, 3 F. & F. 152, *cor. Wilde*, ~~B~~.

Where the question is as to the handwriting of a witness, and the witness in cross-examination was induced to write on a piece of paper, this writing may be used for comparison under the section: *Cobbett v. Kilminster*, 4 F. & F. 490. It may, of course, be a question how far writing so obtained is a fair test of the ordinary handwriting of the witness.

37. Depositions taken on the preliminary or other investigation of any charge of felony or misdemeanour may be read as evidence on the trial of the accused for any other offence although of a higher or different nature, if they would be admissible on his trial for the offence in respect of which they were taken; and such depositions may be proved in the same manner as if the accused were on trial for that offence.

Repealed and re-enacted by Crimes Act 1900.

38. (1) No confession, admission, or statement shall be received in evidence against an accused person in any criminal proceeding if it has been induced—

- (a) by any untrue representation made to him; or
- (b) by any threat or promise held out to him by the prosecutor or some person in authority.

Comparison of
disputed
writing.

20 Vic. No. 31,
s. 15.

22 Vic. No. 7,
s. 1.

46 Vic. No. 17,
s. 360.

Depositions on
one charge
admissible on
trial of
another.

Ibid. s. 352.

Confessions, &c.

22 Vic. No. 7,
s. 11.

46 Vic. No. 17,
s. 357.

(2) Every confession, admission, or statement made after any such representation or threat or promise shall be deemed to have been induced thereby unless the contrary be shown. **S. 38.**

(3) Provided that no confession, admission, or statement by the accused shall be rejected by reason of his having been told by a person in authority that whatever he should say might be given in evidence for or against him.

Repealed and re-enacted by the Crimes Act 1900.

39. No criminating statement by the accused, offered in evidence in any criminal proceeding, if the same was made voluntarily, and before any charge of felony or misdemeanour preferred against him, shall be rejected because of the statement having been on oath. Criminating statements on oath. 46 Vic. No. 17, s. 361.

Repealed and re-enacted by Crimes Act 1900.

40. (1) Every declaration by a person since deceased shall be admissible in evidence in any criminal proceeding in any case where a dying declaration is now admissible, if the declarant was at the time aware of his danger, and on the whole believed that he would shortly die, although he entertained some degree of hope. Dying declarations. Ibid.

(2) No such declaration, if otherwise admissible as a dying declaration, shall be excluded because of its having been or purporting to be on oath.

Repealed and re-enacted by the Crimes Act 1900.

41. (1) Every witness examined in any criminal proceeding as to character, whether of the accused or of any other person, may give evidence, not only as to the general repute of such person, but also as to the witness's own knowledge of his habits, disposition, and conduct. Witnesses of character. Ibid. s. 348.

(2) But no witness in any such proceeding shall be allowed to state that he would not believe another on his oath.

(3) Evidence to the character of the accused shall in all cases be received and dealt with as evidence on the question of his guilt.

See Commissioner's note to s. 27.

Repealed and re-enacted by the Crimes Act 1900.

42. The plaintiff in an action for breach of promise of marriage shall not recover a verdict unless his or her testimony is corroborated by some other material evidence in support of such promise. Actions for breach of promise of marriage. 40 Vic. No. 8, s. 1.

43. When any document is received in evidence by virtue of this Act, the Court admitting the same may, on the request of any party against whom the same has been so received, direct that the same shall be impounded and be kept in the custody of some officer of the Court or other proper person for such period and subject to such conditions as such Court thinks fit. Impounding documents. 18 Vic. No. 16, s. 5. 16 Vic. No. 14, s. 11.

At present the power of impounding is expressly given as to documents admitted by virtue of the Acts in the margin. It is now applied to this Act. It is not thought that this is any real extension of the law; it certainly is not of the practice.—(*Commissioner's Note.*)

S. 44.

PART IV.

BANKERS' BOOKS.

Entries in
bankers' books.
55 Vic. No. 4,
s. 8.

44. Subject to the provisions of this part of this Act, a copy of any entry in a bankers' book shall be evidence of such entry, and of the matters, transactions, and accounts therein recorded.

On an inquiry before the Land Board as to whether a selector had made a false declaration when he said that he had taken up the land solely for his own benefit, a copy of the bank account of G., the owner of the station (known as "The Mole") on which the selection was made, was admitted in evidence. In it there was an entry to the effect that G. had drawn a cheque for £106, being the exact amount paid as a deposit on the selection just about the time the application was made, the payee being "Mole Selection" *Held*, that the copy of the account was wrongly admitted in evidence: *Hart v. The Minister for Lands*, (1901) 1 S.R. 133; 18 W.N. 132.

Proof that book
is a banker's
book.
Ibid. s. 4.

45. (1) A copy of an entry in a bankers' book shall not be received in evidence under this part of this Act, unless it be first proved—

- (a) that the book was, at the time of the making of the entry, one of the ordinary books of the bank; and
- (b) that the entry was made in the usual and ordinary course of business; and
- (c) that the book is in the custody or control of the bank.

(2) Such proof may be given by a partner or officer of the bank, and may be given either orally or by affidavit.

Verification of
copy.
Ibid. s. 5.

46. (1) A copy of an entry in a bankers' book shall not be received in evidence under this part of this Act unless it be further proved that the copy has been examined with the original entry and is correct.

(2) Such proof shall be given by some person who has examined the copy with the original entry, and may be given either orally or by affidavit.

Affidavits when
admissible in
evidence.
Ibid. s. 6.

47. Any affidavit to be used under the provisions of this part of this Act shall be admissible in evidence if it purport to be sworn before a commissioner or other person authorised to take affidavits.

Criminal
proceedings.
46 Vic. No. 17,
s. 353.

48. In any criminal proceeding in which it is necessary to prove—

- (a) the state of an account in the books of a banking corporation or company; or
- (b) that any person had not an account or any funds to his credit in such books,

it shall not be necessary to produce any such book, but evidence of the state of such account, or that no such account or funds existed, may be given by any officer or clerk of such corporation or company who has examined such books.

See Commissioner's Note to s. 27.

Repealed and re-enacted by the Crimes Act 1900.

Cases in which
banker, &c.,
not compellable
to produce book,
&c.
55 Vic. No. 4,
s. 7.

49. A banker, or officer of a bank, shall not, in any legal proceeding to which the bank is not a party, be compellable—

- (a) to produce any banker's book, the contents of which can be proved under this part of this Act; or

- (b) to appear as a witness to prove the matters, transactions, and accounts therein recorded, **S. 49.**

unless by order of a Judge of the Supreme Court made for special cause.

50. (1) On the application of any party to a legal proceeding, the Court or a Judge of the Supreme Court may order that such party be at liberty to inspect and take copies of any entries in a banker's book relating to the matters in question in such proceeding. Inspection of bankers' books: 65 Vic. No. 4, s. 8.

(2) An order under this section may be made either with or without summoning the bank or any other party, and shall be served on the bank two clear days before the same is to be obeyed, unless the Court or Judge otherwise directs.

The order may apparently be made *ex parte*, but it is better to serve the person whose account is to be looked at: *Arnott v. Hayes*, 36 Ch. D. 736.

51. (1) The costs of—

- (a) any application to a Court or Judge under or for the purposes of this part of this Act; or of Costs. Ibid. s. 9.
 (b) anything done or to be done under an order of a Court or Judge made under or for the purposes of this part of this Act,

shall be in the discretion of the Court or Judge, who may order the same or any part thereof to be paid to any party by the bank where the same have been occasioned by any default or delay on the part of the bank.

(2) Any such order against a bank may be enforced as if the bank was a party to the proceeding.

52. The Chairman of a Court of Quarter Sessions, or the Judge of a District Court may, with respect to any proceedings in any Court of Quarter Sessions or in any District Court, exercise the powers of a Judge of the Supreme Court under this part of this Act. District Courts, &c. Ibid. s. 2.

PART V.

EXAMINATION AND CROSS-EXAMINATION OF WITNESSES.

53. A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but he may if the witness in the opinion of the Court proves adverse— How far a party may discredit his own witness. 20 Vic. No. 81, s. 11.

(a) contradict him by other evidence; or

(b) by leave of the Court prove that he has made at other times a statement inconsistent with his present testimony; 22 Vic. No. 7, s. 1.
 but before such last-mentioned proof can be given, the circumstances of the supposed statement sufficient to designate the particular occasion must be mentioned to the witness, and he must be asked whether or not he has made such statement.

These provisions are intended to meet the case of a witness unexpectedly turning round on the party calling him; and of enabling a party, who, from the nature of the inquiry, is obliged to call a witness, who then unexpectedly proves hostile, to contra-

- S. 53.** dict that witness, if needful; yet not so as to pick and choose his testimony, discarding part, and relying upon other part: *per Campbell, C.J., Faulkner v. Brine*, 1 F. & F. 254; or to enable a witness to be put forward, who is, avowedly, generally unworthy of credit.

The argument in favour of the admissibility of such evidence was powerfully put by Lord Denman in his judgment in the case of *Wright v. Beckett*, 1 M. & Rob. 414, 425:—"If the witness professing to be mine," says his lordship, "has been bribed by my adversary to deceive me,—if, having taught me to expect the truth from him, he is induced by malice or corruption to turn round upon me with a newly-invented falsehood, which defeats my just right, and throws discredit on all my other witnesses.—must I be prevented from showing the jury facts like these? Suppose that in some dispute happening in the street, a bystander declares his name to one of the contending parties, and his readiness to prove his conduct blameless; that he attends the solicitor, and gives in his deposition to the same effect, but, when sworn in open court, takes part with the adversary. The question then is, whether he is to be believed, or the other witnesses called by the same party. Some one in court happens to know him, and whispers to the attorney, 'He has deceived you in every way; he has given you a false name; he is the adversary's brother and partner: moreover, he has been for years notoriously infamous!' Or, suppose such a trial for misdemeanour, as some that have lately revolted the public mind; and that some stranger, after voluntarily offering his testimony to a calumniated man, should unexpectedly side with his false accuser. If the rule against *discrediting* your own witness must be strictly construed, these deceptions cannot be exposed. You will be told that you have called him; you must take him for better and for worse, and must be bound by all his statements. Or, if you are permitted, by reason of your late discovery of these facts, to prove them for your own necessary protection, this must be, because the rule cannot apply to a case where such facts are brought to your knowledge after you have placed him in the witness box. The rule, therefore, is limited by that condition; and you shall be at liberty to discredit your witness by such evidence, because you have been deceived and surprised. Can any reason then be assigned, why, when equally deceived by his denying to-day what he asserted yesterday, you should be excluded from showing the contradiction into which, from whatever motive, he has fallen? It is clear that, in civil cases, the exclusion might produce great injustice, and in criminal cases improper acquittals and fraudulent convictions."

It must not be inferred, from the use of the words "*general evidence*," that a party may give *particular* evidence of bad character; for such particular evidence as to the character of a witness (that is to say, particular instances of bad conduct) is not allowed to be given by either party, unless relevant to the issue.

To enable a party thus to contradict his own witness, the witness must appear not merely *unfavourable*, but actually *hostile*: *Greenhough v. Eccles*, 5 C.B., N.S. 786. *Cockburn, C.J., dubitante*; *Coles v. Coles*, L.R. 1 P. & D. 70, *per Wilde, J.O.*

This section does not introduce any new rule of evidence. In three classes of cases a party was always permitted to contradict the statement of a witness called by him. First. Where he is under the necessity of calling a witness for the purpose of satisfying the formal proof which the law requires, he is not precluded from calling other witnesses who give contradictory testimony (*Starkie on Evidence*, 4th ed., p. 244); as where an attesting witness denied the fact of his attestation, or the signature of the party. Secondly. Where a witness, called to prove a particular fact, does not deny that fact, but gives evidence (generally on cross-examination) of other facts material to the same or other issues in the cause, as in the case put by *Tindal, C.J.*, in delivering judgment in *Bradley v. Ricardo*, 8 Bing. 58; or where a plaintiff, for some formal proof, is obliged to make a witness of the defendant's attorney, who, on cross-examination, makes a statement adverse to the plaintiff; or where, on the question of a devise of real estate, an attesting witness is called to prove and does prove the execution of the will, but entertains an adverse opinion as to the capacity of the testator, as in *Lowe v. Joliffe*, 1 W. Bl. 365. In either of these classes of cases it was always immaterial, so far as the right of the party to call contradictory evidence was concerned, whether he knew beforehand that the witness would prove adverse. Thirdly. Where a witness by surprise gives evidence against the party who called him, that party is not precluded from proving his case by other witnesses; for it would be contrary to justice, that the treachery of a witness should exclude a party from establishing the truth by aid of other testimony: *Starkie, supra*.

Such contradictions must, on the general rules of evidence, be of facts material to the issue to be tried, for as the witness cannot be examined except as to facts material to the issue, by necessity he cannot be contradicted except on such material facts.

But independently of, or in addition to the contradiction as to facts, by other evidence, the party may, "by leave of the Court, prove that he has made at other times

a statement inconsistent with his present testimony." This also settles what was before a moot point, rather than introduces any positive new rule of evidence.

S. 53.

The statement may be verbal or written ; it must be material to the issue, or (to use the words of the subsequent section) it must be " relative to the subject matter of the cause."

A series of letters may be used for the purpose, though one only be directly inconsistent : *Jackson v. Thomason*, 1 B. & S. 745 ; 31 L.J.Q.B. 11.

Where a witness gave evidence quite different from the proof in the brief which had been prepared in the usual way from the previous statements of the witness to the attorney, *Bramwell*, B., allowed him to be examined under this section as to his previous oral statements to the attorney ; and also allowed the attorney to be called to contradict him : *Amstell v. Alexander*, 16 L.T., N.S. 830. But in a similar case the Court of Exchequer said that the section was not meant to apply to the loose statements made by the witness to the attorney with a view to prepare the evidence, and granted a rule nisi for a new trial, on the ground that witnesses had been called at the trial to prove such statements : *Reed v. King*, 30 L.T. 290, H. T. 1858.

On this section the case of *Russell v. Dalton*, (1883) 4 N.S.W.R. 261, should be consulted. " It appears that the witness had made a statement to the attorney of the party who called him, and, when in the witness box, the evidence that he gave was apparently not consistent with what was taken down as having been said by him to the attorney. The jury were not made aware that he had made a written statement contrary to the evidence which he gave in Court, but the statement signed by the witness was handed up to the judge, and was then put into the hands of the witness who was asked whether he had made a statement of that kind. The question was not put in this form, ' Did you make a statement inconsistent with what you have stated here ? ' nor was the fact disclosed (*semble*, to the jury at that stage) that his evidence was contrary to statements previously made by him. The judge having heard his answer to this question, and a witness having been put into the box who proved that he did make the statement, then the judge came to the conclusion that he was adverse. It seems to me that the materials on which to base his conclusions were before him and that the conclusion which he arrived at was a right one. It seems to me, apart from decisions, that the judge was in a position to allow the cross-examination of this witness to take place." This extract from the judgment of *Martin*, C.J., shows what was done and what in the opinion of the Court may be done under such circumstances. After the witness had been cross-examined, evidence was given (to the judge) of the previous statements made by him ; the witness apparently not admitting that he had made such statements (see next section). " The judge has to be satisfied as to whether or not a witness called by one of the parties proves hostile to the person calling him ; but there is no mode pointed out by the Statute by which the judge may satisfy himself as to that fact. Ordinarily the only way to do so is by the demeanour of the witness, but there are other means which the judge may adopt in order to satisfy himself as to whether the witness is hostile or not," (*ibid*).

Where a witness had given contrary evidence on his examination in bankruptcy it seems that evidence was allowed to be used to contradict him : *Pound v. Wilson*, 4 F. & F. 301 ; see also *Dear v. Knight*, 1 F. & F. 433, and *Martin v. Travellers' Insurance Co.*, *ibid* 505.

It has been held that where a party calls other witnesses to contradict his own witness as to a particular fact, the whole of the testimony of the contradicted witness is not therefore to be necessarily repudiated : *Bradley v. Ricardo*, 8 Bing. 58. But in *Faulkner v. Brine*, 1 F. & F. 254, Lord Campbell, C.J., intimated that the effect of such contradiction was to throw over the witnesses' evidence altogether.

In *Ryberg v. Ryberg*, 32 L.J. P.M. & A. 112, it was held not to be competent to a party to contradict his own witness, by the witness's previous statements in writing ; this case, however, was decided on s. 54, *infra*, and the present section, which would have led to an opposite conclusion, was not referred to.

54. If a witness upon cross-examination as to a former statement made by him relative to the subject-matter of the cause or proceeding, and inconsistent with his present testimony, does not distinctly admit that he has made such statement, proof may be given that he did in fact make it.

Contradicting statements of adverse witness.
20 Vic. No. 31,
s. 12.
22 Vic. No. 7,
s. 1.

But before such proof can be given, the circumstances of the supposed statement sufficient to designate the particular occasion

- S. 54.** must be mentioned to the witness, and he must be asked whether or not he has made such statement.

This enactment declares the law to be as laid down by *Parke, B.*, in *Crowley v. Page*, 7 C. & P. 789, 791 : "Evidence of statements by witnesses on other occasions relevant to the matter at issue, and inconsistent with the testimony given by them on the trial, is always admissible in order to impeach the value of that testimony ; but it is only such statements as are relevant that are admissible ; and, in order to lay a foundation for the admission of such contradictory statements, and to enable the witness to explain them, and, as I conceive, for that purpose only, the witness may be asked whether he ever said what is suggested to him, with the name of the person to whom or in whose presence he is supposed to have said it, or some other circumstance sufficient to designate the particular occasion. If the witness, on the cross-examination, admits the conversation imputed to him, there is no necessity for giving further evidence of it ; but if he says *he does not recollect*, that is not an admission, and you may give evidence on the other side to prove that the witness did say what is imputed, always supposing the statement to be relevant to the matter at issue. This has always been my practice. If the rule were not so, you could never contradict a witness who said he could not remember."

55. A witness may be cross-examined as to—

- (a) a previous statement made or supposed to have been made by him in writing or reduced into writing ; or
- (b) evidence given or supposed to have been given by him before any justice,

without such writing or the deposition of such witness being shown to him.

But if it is intended to contradict him by such writing or deposition, his attention must, before such contradictory proof can be given, be called to those parts of the writing or deposition which are to be used for the purpose of so contradicting him :

Provided always that the Court may at any time during the trial require the production of the writing or deposition for inspection by the Court, and may thereupon make such use of it for the purposes of the trial as the Court thinks fit.

This section alters the rule laid down in the *Queen's Case*, 2 B. & B. 286, as to the cross-examination of witnesses in respect of previous statements in writing.

The effect is this : the witness, in the first instance, may be asked, whether he has made such and such a statement in writing, without its being shown to him : *Sladden v. Sargeant*, 1 F. & F. 322, *per Willes, J.* If he denies that he has made it, the opposite party cannot put in the statement, without first calling his attention to it (showing it, or at least reading it to him), and to any parts of it relied upon as a contradiction. If the witness instead of denying that he has made the statement, admits it, although the object of the cross-examining counsel has been attained, it may be very important for the party calling the witness to have the whole statement, which may not be in his possession, before the court and jury. If he is aware of the contents, he will, it would seem, in such case, be at liberty to re-examine the witness, as to the residue of the statement, without its being produced, on the general rule that if part of any connected conversation or statement be given, the whole may be used ; or he may ask the judge, under the latter part of the section, to require the production of the writing.

In the case of *Yates v. Municipal Council of Dubbo*, (1882) 3 N.S.W.R. 315 counsel for defendants asked the plaintiff whether he had authorised a certain letter to be written by his attorney mentioning its contents. The question was rejected on the ground that the letter was not put in evidence. On appeal, *held* that the cross-examination was clearly admissible.

In those cases in which the document would be good evidence in chief, and not merely by way of testing the credibility of the witness, it would seem that the section does not apply so as to exclude an admission in writing made or used by the other party, where the attention of the party making the statement has not been directed to its contents. And so on the other hand a party to an action may be asked on cross-examination as to anything said or read in his hearing without the production of the document referred to, or read from : *Canning v. Brown*, (1867) 6 S.C.R. 169.

Cross-examination as to previous statements in writing or deposition.
20 Vic. No. 31, s. 13.
22 Vic. No. 7, s. 1.
46 Vic. No. 17, s. 350.

§. 55.

It must be always borne in mind that this section is confined to written statements made by the witness, relative to the subject-matter of the cause. This section, therefore, does not interfere with the decision in *Macdonnell v. Evans*, 11 C.B. 930. In that case, upon the cross-examination of a witness, a letter in his own handwriting was shown to him, and he was asked—"Did you not write that letter in answer to a letter charging you with forgery?" It was held that the question was inadmissible for any purpose, inasmuch as it was an attempt to get at the contents of a written document, which, for anything that appeared, might have been produced. As the question, therefore, referred to the contents of a letter written by a third person, and not by the witness, the case is not affected by this section.

When the statement in writing, is an affidavit or deposition filed in some court, the question arises whether the section will be satisfied if an examined or office copy be brought into court at the trial, or whether for the purpose of contradicting the witness the original must be produced. It would seem that this section was not intended in any way to narrow the old practice, and that the provisions of the section as to the production of the writing would be substantially satisfied by the production of any copy on which a witness previously to this enactment might have been cross-examined: see *Taylor on Evidence*, 8th ed., vol. ii., pp. 1237-8.

In many cases, decided before the Act came in force, office and examined copies of answers in Chancery and affidavits have been allowed to be used for the purpose of cross-examination and of contradicting the oral evidence of the parties who made them: see *Highfield v. Peake*, M. & M. 109; *Burnard v. Nerot*, 1 C. & P. 578; *Ewer v. Ambrose*, 4 B. & C. 25; *Garvin v. Carroll*, 10 Ir. L.R. 323, and *Davies v. Davies*, 9 C. & P. 252. The case of *Bastard v. Smith*, 10 Ad. & E. 213, is sometimes cited to show that for the purpose of cross-examination the original affidavit must be produced; but all that appears from the report is, that the court would not interfere with the master's allowance of the costs of bringing down the original.

In a criminal case a witness for the prosecution being asked, denied that he had asked a certain magistrate to sit at the Police Court on the preliminary hearing of the charge. Evidence was allowed to be given to contradict him: *R. v. Baker*, (1862) 1 S.C.R. 51.

Plaintiff, called in reply, denied in cross-examination that he had, on leaving the Court previously, told his son to be sure and say what he had told him; evidence was allowed in rejoinder to contradict him: *Gallimore v. Moore*, (1867) 6 S.C.R. 388.

Where an answer given on cross-examination, though it would have originally been relevant to the issue, yet has become irrelevant by the disclaimer of the opposite party, the party cross-examining is bound by the answer: *Trotter v. Bennett*, (1882) 3 N.S.W.R. 161.

If counsel in cross-examination puts the witnesses depositions, taken at the Police Court into his hands, and asks him whether after looking at it, he adheres to his former statement, the depositions must be put in evidence, even though the counsel's object be merely to refresh the memory of the witness: *Reg. v. Jack*, (1894) 15 N.S.W.R. 196; 10 W.N. 202.

In an action for malicious prosecution, the depositions of the witnesses are inadmissible in evidence, but the plaintiff can put in the depositions of the defendant: *Seamen v. Hargreaves*, (1862) 1 S.C.R. 51.

SCHEDULE.

Reference to Act.	Title or short title.	Extent of repeal.
5 Vic. No. 9.	An Act for the further amendment of the law and for the better advancement of justice.	Section 25.
7 Vic. No. 16	An Act to consolidate and amend the laws relating to the registration of deeds and other instruments in that part of the Colony of New South Wales not comprehending the district of Port Phillip.	The unrepealed part of section 13, and sections 24 and 30.
8 Vic. No. 1	An Act for improving the law of evidence	The whole.
11 Vic. No. 38	An Act to facilitate the proof of letters patent or deeds of grant from the Crown.	The whole.

Sch. 1.

Reference to Act.	Title or short title.	Extent of Repeal.
11 Vic. No. 46	An Act to prevent frivolous and vexatious arrests of ships and vessels or the masters or commanders thereof by process issuing out of the Vice-Admiralty Court of New South Wales.	Section 3.
13 Vic. No. 16	An Act to amend the law of evidence, and to facilitate the admission as evidence of certain official and other documents, and to give protection to persons employed in the printing and publication of papers by the order or authority of the Legislative Council or a committee thereof.	Sections 1, 2, 3, 4, and part of section 5, from "Provided also" to the end of the section inclusive.
16 Vic. No. 14	An Act to amend the law of evidence. . .	Sections 1, 2, 3, 4, 5, 7, 8, 9, part of section 11 from "and whenever" to "seem meet" inclusive, and section 12.
17 Vic. No. 39	The Justices Amendment Act of 1853. . .	Part of section 12, from, "and the words justice of the peace" to the end of the section inclusive.
18 Vic. No. 13	An Act further to amend the law of evidence. ,	Section 1.
19 Vic. No. 30	An Act to amend and consolidate the laws affecting the solemnisation of marriage.	Section 16.
19 Vic. No. 34	An Act for registering births, deaths, and marriages.	Part of section 10 from "and all certificates or certified copies so sealed to the end of the section inclusive; and section 19.
20 Vic. No. 31	The Common Law Procedure Act of 1857	Sections 11, 12, 13, 14, and 15.
22 Vic. No. 7	An Act for the further amendment of the law of evidence.	The whole, except so much of section 1 as refers to the tenth section of the Common Law Procedure Act of 1857, and except section 10.
24 Vic. No. 16	Proof by Declaration Abolition Act of 1861	The whole.
36 Vic. No. 9	Matrimonial Causes Act	Sections 11, 13, 14, and 37.
40 Vic. No. 8	Evidence Further Amendment Act, 1876	Section 1.
46 Vic. No. 3	Evidence in Summary Convictions Act. .	The whole.
46 Vic. No. 17	Criminal Law Amendment Act of 1883. .	Sections 348, 350, the proviso to section 351, sections 352, 353, 354, 357, 358, so much of section 359 as relates to the custody of records during the sitting of a Circuit Court, sections 360, 361, part of section 442 from "and whenever" to the end of the section inclusive, and section 472.
51 Vic. No. 19	Bankruptcy Act, 1887	Section 146.

Evidence Act.

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Sch. 1.

Reference to Act.	Title or Short title.	Extent of Repeal.
52 Vic. No. 14	Companies Act of 1888	Part of section 6 from "and any copy" to the end of the section in- clusive.
54 Vic. No. 25	Probate Act of 1890	Section 21.
55 Vic. No. 4	Bankers' Books Evidence Act, 1891 ..	The whole.
55 Vic. No. 5	Criminal Law and Evidence Amendment Act of 1891.	Sections 6, 8, part of section 9 down to and including the words "signed the same," and sections 10 and 11.
55 Vic. No. 30	Children's Protection Act, 1892	Section 23.
56 Vic. No. 36	Matrimonial Causes Procedure Amend- ment Act.	Section 9.

S. 1.

FORFEITURE OF LEASES ACT 1901.

ACT No. LXVI, 1901:

An Act for granting relief against forfeiture of leases and for otherwise amending the law as to property.
[Assented to, 24th December, 1901.]

BE it enacted by the King's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and Legislative Assembly of New South Wales in Parliament assembled, and by the authority of the same as follows :—

Restrictions on
and relief
against forfeit-
ure of leases.
44 and 45 Vic.
c. 41, s. 14.

1. (1) A right of re-entry or forfeiture under any proviso or stipulation in a lease for a breach of any covenant or condition in the lease shall not be enforceable by action or otherwise, unless and until the lessor serves on the lessee a notice specifying the particular breach complained of, and if the breach is capable of remedy, requiring the lessee to remedy the breach, and in any case requiring the lessee to make compensation in money for the breach, and the lessee fails within a reasonable time thereafter to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money to the satisfaction of the lessor for the breach.

(2) Where a lessor is proceeding by action or otherwise to enforce such a right of re-entry or forfeiture, the lessee may in any suit brought by himself in the Supreme Court of New South Wales in its equitable jurisdiction apply to that court for relief; and that court may grant or refuse relief as that court, having regard to the proceedings and conduct of the parties under the foregoing provisions of this section and to all the other circumstances, thinks fit; and in case of relief may grant it on such terms, if any, as to costs, expenses, damages, compensation, penalty, or otherwise, including the granting of an injunction to restrain any like breach in the future as the court in the circumstances of each case thinks fit.

(3) For the purpose of this section a lease includes an original or derivative under-lease, also a grant at a fee farm rent, or securing a rent by condition; and a lessee includes an original or derivative under-lessee, and the heirs, executors, administrators, and assigns of a lessee, also a grantee under such a grant as aforesaid, his heirs and assigns; and a lessor includes an original

or derivative under-lessor, and the heirs, executors, administrators, and assigns of the lessor, also a grantor as aforesaid, and his heirs and assigns.

S. 1.

(4) This section applies although the proviso or stipulation under which the right of re-entry or forfeiture accrues is inserted in the lease in pursuance of the directions of any Act of Parliament.

(5) For the purposes of this section a lease limited to continue as long only as the lessee abstains from committing a breach of covenant, shall be and take effect as a lease to continue for any longer term for which it could subsist, but determinable by a proviso for re-entry on such a breach.

(6) This section does not extend—

- (a) to any Crown lease or to any lease granted by an owner under section eleven of the Mining Laws Amendment Act, 1896, or to any lease or tenancy for a term of one year or less ; or
- (b) to a covenant or condition against the assigning, under-letting, parting with the possession or disposing of the land leased ; or to a condition for forfeiture on the bankruptcy of the lessee, or on the taking in execution of the lessee's interest.

(7) This section shall not affect the law relating to re-entry or forfeiture or relief in case of non-payment of rent.

2. (1) The notice mentioned in section one shall be in writing, and in the form set out in the Schedule or to a similar effect. Regulations respecting notice.

(2) Such notice shall be sufficient, although only addressed to the lessee by that designation, without his name, or generally to the persons interested, without any name, and notwithstanding that any person to be affected by the notice is absent, under disability, unborn, or unascertained.

(3) Such notice shall be sufficiently served if it is left at the last-known place of abode or business in the Colony of the lessee, or affixed or left for him on the land or any house or building comprised in the lease, or, in the case of a mining lease, is left for the lessee at the office or counting-house of the mine.

(4) Such notice shall also be sufficiently served if it is sent by post in a registered letter addressed to the lessee by name, at the aforesaid place of abode or business, office, or counting-house, and if that letter is not returned through the post-office undelivered ; and that service shall be deemed to be made at the time at which the registered letter would in the ordinary course be delivered.

(5) Such notice shall also be sufficiently served on any person who is absent from the Colony if it is served personally on his attorney or agent within the Colony.

3. There shall not after the commencement of this Act be held or deemed to be any merger by operation of law only of any estate the beneficial interest in which would not be deemed to be merged or extinguished in equity. Merger.
36 & 37 Vic.
c. 66, s. 25,
sub-s. (4).

S. 4.

Application of
Act.

44 & 45 Vic.
c. 41, s. 14,
sub-s. (9).

Judges may
make rules.

4. This Act applies to leases made either before or after the commencement of this Act, and to any merger by operation of law only arising before or after the commencement of this Act, and shall have effect notwithstanding any stipulation to the contrary.

5. The Judges of the Supreme Court, or any three of them, may make general rules for regulating the times and form and mode of procedure and the forms to be used in connection therewith, and generally the practice of the Court in respect of the several matters to which this Act relates.

Short title.

6. This Act may be cited as the "Forfeiture of Leases Act of 1901."

SCHEDULE.

To

Notice to lessee
to remedy
breach.

The lessee of [*here describe premises with reasonable certainty, as for instance, "No. 369, George-street, Sydney"*].

Having reference to the lease of the abovementioned premises, dated the _____ day of _____, 1____, from A.B. to C.D., and the covenant by the lessee therein contained [*here state concisely the nature of the covenant or covenants breach of which is complained of, as for instance, "to repair,"*] and the breach by you of that covenant I hereby give you notice and require you to remedy that breach by [*here set out the remedy as, for instance, "by forthwith putting the said premises in repair by doing and executing the repairs in and upon the said premises which are specified in the Schedule hereto annexed"*]. And I further require you to make reasonable compensation to my satisfaction for the breach already committed, which compensation I assess at the sum of £ _____

Dated the _____ day of _____, 19____.

Lessor.

GENERAL LEGAL PRO- CEDURE ACT 1902.

TABLE

Showing how the sections of Acts consolidated have been dealt with.

Section of Repealed Acts.	Section of Consolidated Act.	Remarks.
4 Will. IV, No. 17 .. (adopting 9 .. Geo. IV, c. 14) .. ss. 1, 3, 4 .. 2 .. 5-10 ..	9	To be dealt with in Statute of Limitations.
4 Vic. No. 6, s. 25 ..	10	Dealt with in Usury, Bills of Lading, and Written Memorandum Act, 1902.
4 Vic. No. 22, s. 10 ..	.....	Remainder of Act dealt with in Common Law Procedure Act, 1899.
28 ..	10	Repealed in part by Crimes Act, 1900 ; remainder obsolete.
5 Vic. No. 9, s. 21 ..	13	
28 ..	7	The omitted part is superseded by s. 55 of the Common Law Procedure Act, 1899.
29 ..	8	
42 ..	11	Part repealed by Common Law Procedure Act, 1899.
6 Vic. No. 18, s. 1 ..	14	Omitting reference to Melbourne and to incompetent witnesses.
13 Vic. No. 34, s. 1 ..	3	
2 ..	.....	Superseded by 29 Vic. No. 18.
14 Vic. No. 9, s. 9 ..	12	
22 Vic. No. 12, s. 7 ..	5	
9 ..	6	
29 Vic. No. 18, s. 1 ..	4	

ACT No. XXXIV., 1902.

An Act to consolidate certain enactments relating to legal procedure. [Assented to, 20th August, 1902.]

BE it enacted by the King's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and Legislative Assembly of New South Wales in Parliament assembled, and by the authority of the same, as follows :—

1. This Act may be cited as the "General Legal Procedure Act, 1902." Short title.

S. 2.

Repeal.

2. (1) The enactments mentioned in the First Schedule, to the extent therein expressed, are hereby repealed.

(2) All rules made under the authority of any Act hereby repealed, and in force at the time of the passing of this Act, shall be deemed to have been made hereunder.

Service of Writs,
&c., of Supreme
Court.

13 Vic. No. 34,
s. 1.

3. Every writ, summons, rule, or order of the Supreme Court requiring service may be served by the sheriff or his deputies, or by any other person.

Issue of writs
of summons
and subpoena
at circuit towns.
29 Vic. No. 18,
s. 1.

4. (1) The Judges of the Supreme Court may by rule empower any commissioner of the said Court for taking affidavits, under such regulations as they think proper, to receive any præcipe for and to issue any writ of summons of the said Court at any circuit town now or hereafter to be appointed, and also any writ of subpoena to give evidence in any case, civil or criminal.

(2) Every such writ shall be returnable in the Supreme Court at Sydney, and every such præcipe shall, as soon as conveniently may be after the issue of the writ to which the same relates, be transmitted by the commissioner who received the same to the office of the prothonotary of the said Court.

See RR. 28, 29 (*post*).

The following Bill having passed through all its stages in the Legislative Council was read a first time in the Assembly last session (1902) and will in all probability become law during 1903 :—

1. This Act may be cited as the " Issue of Process at Country Towns Act 1902."

2. The Judges of the Supreme Court, or any three of them, may, by rules of court, empower, under such conditions as they think fit to insert in such rules, such commissioners of the said Court for taking affidavits as they may approve—

(a) to receive any præcipe for and to issue any writ of summons in the common law jurisdiction of the said Court ;

(b) to seal or sign or seal and sign any originating process issuing out of the said Court in its equitable jurisdiction ;

(c) to receive any præcipe for and to issue any writ of subpoena to give evidence in any case, civil or criminal,

at such country towns as may be approved by the said Judges :

Provided that every such writ of summons shall be returnable in the Supreme Court, at Sydney, and that every such præcipe shall, as soon as conveniently may be after the issue of the writ to which the same relates, be transmitted by the commissioner who received the same to the Prothonotary or other proper officer of the said Court.

Term "Statute"
or "Act" in
in pleadings,
&c.

22 Vic. No. 12,
s. 7.

5. In all pleadings and proceedings the word " Statute " or " Act," used to indicate an enactment, shall mean and include an Act or an Imperial Act, as the context or the case may require.

General issue
by statute
pleaded by
public officers.
Ibid. s. 9.

6. Whenever a power is conferred or a duty imposed by any Act or Imperial Act upon any person by virtue or in the exercise of any public office or employment, and such person is sued in respect of anything done by him which he shall allege to have been done in pursuance thereof, he may plead the general issue (with or without any other plea or pleas), and give the special matter in evidence under that plea, and if he succeeds in the action he shall recover costs as between attorney and client :

Provided that he shall, at the foot of his plea, state the particular Act or Imperial Act, and section or sections upon which he

intends to rely ; and no other enactments shall at the trial be relied on by him. **S. 6.**

See *Callinan v. Railway Commissioners*, (1901) 1 S.R. 89 ; 18 W.N. 94 ; where it was held that the English Rule dealing with the plea of not guilty by Statute, (R. 21 Trin. Term 1853) did not apply in this State. Under our Rules if not guilty be pleaded and no Statute is mentioned in the plea, that does not prevent the defendant relying on a Statute as a defence to the action ; the only penalty for such an omission is that the defendant cannot get the costs of the plea or of any witness called to support the same.

In an action of negligence against the Railway Commissioners, they pleaded not guilty, but did not note the Act 51 Vic. No. 35 at the foot of the plea. *Held*, that on the pleadings they could raise the point that no notice of action had been given under s. 104 of 51 Vic. No. 35, *ibid*.

See now, R. 84 (*post*).

7. In all actions brought by executors or administrators in right of their testator or intestate, such executors or administrators (unless the Court or a Judge otherwise orders) shall be liable to pay costs to the defendant in case of being nonsuited or a verdict passing against them, and in all other cases in which they would be liable to costs if suing upon a cause of action accruing to themselves in their own right, and the defendant shall have judgment for such costs accordingly. Liability of plaintiffs, executors, and administrators to pay costs. 5 Vic. No. 9, s. 28.

8. No wager of law shall be allowed, and actions of debt shall be maintainable on simple contract against executors or administrators. Wager of law not allowed. *Ibid* s. 29.

9. If any defendant in an action on a simple contract plead any matter in abatement to the effect that any other person or persons ought to be jointly sued, and issue is joined on such plea, and it appears at the trial that the action could not by reason of any Statute of Limitations be maintained against such other person or persons or any of them, the issue joined on such plea shall be found against the party pleading the same. Pleas in abatement. 4 Will. IV, No. 17, adopting 9 Geo. IV, c. 14, s. 2.

See C.L.P. Act, s. 41, note, (*ante*).

10. The Supreme Court may, in every case in which the ends of justice appear to render that mode of inquiry expedient, in any branch of its jurisdiction— Feigned issue and proceedings thereon. 4 Vic. No. 6, s. 25. 4 Vic. No. 22, s. 28.

- (a) direct the trial by a jury of any feigned issue or issues ;—
- (b) make all such orders and issue all such writs and cause all such proceedings to be had and taken as the Court thinks necessary for that purpose ; and
- (c) upon the finding of such jury (unless a new trial is for any sufficient reason ordered), give such decision and make such decree or pronounce such judgment in the cause or matter pending before them as justice seems to require.

And see C.L.P. Act, s. 51, (*ante*).

In *re Rundle*, (1894) 11 W.N. 59, an order was made for the trial of a feigned issue (without writ) to determine questions arising on a special case stated under the Stamp Duties Act, 44 Vic. No 3 ; and see *Ex parte Saunders*, (1900) 16 W.N. 167.

11. In all cases where the Supreme Court or a Judge thereof is authorised to direct the trial of any feigned issue, such Court or Judge may impose such conditions on the parties respectively, and Feigned issue subject to conditions or admissions. 5 Vic. No. 9, s. 42.

- S. 11.** direct such admissions to be made by them or either of them for the purpose of such trial as the Court or Judge thinks fit, and for the purposes aforesaid make all such orders as may be necessary.

Proceedings
in lieu of
feigned issue.
14 Vic. No. 9,
s. 9.

Second
Schedule.

12. (1) In every case where any Court of law or equity desires to have any question of fact decided by the jury, such Court may direct a writ of summons to be sued out, by such person or persons as the Court thinks ought to be plaintiff or plaintiffs against such person or persons as the Court thinks ought to be defendant or defendants therein, in the form set forth in the Second Schedule to this Act, with such alterations or additions as such Court may think proper.

(2) Thereupon all the proceedings shall go and be brought to a close in the same manner as proceedings under a feigned issue.

See *In re Jeremiah Rundle*, (1894) 11 W.N. 59; and *Ex parte Saunders*. (1900) 16 W.N. 167.

Special case on
matters of law.
5 Vic. No. 9,
s. 21.

13. (1) In all cases where by any law the Supreme Court or a Judge thereof is empowered to direct or authorise the trial of a feigned issue for the determination of any question of fact, such Court or Judge may direct or allow the statement of a special case for the opinion of the Court on any matter of law.

(2) On the decision of any such case the Court may make such order or orders in the matter, and give such adjudication, or cause such judgment to be entered therein as the Court thinks fit.

See also C.L.P. Act, s. 55, (*ante*).

Judges, jus-
tices, and
others may act.
6 Vic. No. 18,
s. 1.

14. No Judge of the Supreme Court, justice of the peace, or other inhabitant of the city of Sydney, or of any incorporated town or city, discharging any judicial or civil functions whatever shall be disabled from acting in the due discharge and execution of his respective duties by reason of his being a member of the corporation interested; and any such Judge, notwithstanding that he is a member of such corporation, may sit, determine, or otherwise adjudicate on the matters brought before him connected with the said corporation as in any ordinary case of the like nature; and any person named as juror or assessor may act as such juror or assessor in any such proceeding; and any justice of the peace of any incorporated town may act as justice in like manner as if he had not been directly or indirectly interested in the concerns of such corporation.

See *Lord v. Mayor of Sydney*, (1870) 9 S.C.R. 94; *Ex parte O'Connor*, (1869) 8 S.C.R. 142.

SCHEDULES.

Sch. 1.

FIRST SCHEDULE.

Reference to Act.	Title or short title.	Extent of Repeal.
4 Wm. IV No. 17	An Act for adopting and applying a certain Act of Parliament for rendering a written memorandum necessary to the validity of certain promises and engagements.	So much of the Act as adopts s. 2 of 9 Geo. IV, c. 14.
4 Vic. No. 6 ..	An Act to consolidate and amend the laws relating to actions against persons absent from the Colony, and against persons sued as joint contractors.	The unrepealed portion.
4 Vic. No. 22 ..	An Act to provide for the more effectual administration of justice in New South Wales and its dependencies.	The unrepealed portion.
5 Vic. No. 9 ..	An Act for the further amendment of the law and for the better advancement of justice.	Sections 21, 28, 29, and the unrepealed portion of section 42.
6 Vic. No. 18 ..	An Act to remove doubts in respect to the exercise of certain powers by the Councils of the City of Sydney and town of Melbourne, and to declare the competency of witnesses and the jurisdiction of magistrates in certain cases within the same.	Section 1.
13 Vic. No. 34 ..	An Act to make further provision for the issue and service of process in the Supreme Court.	The whole.
14 Vic. No. 9 ..	An Act to amend the law concerning games and wagers.	The unrepealed portion.
22 Vic. No. 12 ..	An Act to amend and extend the Act passed for shortening Acts of the Legislature.	Sections 7 and 9.
29 Vic. No. 18	An Act to make further provision for the issue of process at circuit towns.	The whole.

SECOND SCHEDULE.

Section 12.

In the Supreme Court of New South Wales
[or any inferior Court].

New South Wales to wit (or such other venue as may be directed).

WHEREAS A.B. affirms and C.D. denies [here state fully the fact or facts in issue], and the Judges of the Supreme Court of New South Wales [or such other Court, &c.], are desirous of ascertaining the truth by the verdict of a jury, and both parties pray that the same may be inquired of by the country.

S. 1.

INTERPLEADER ACT 1901.

TABLE

Showing how the sections of Acts consolidated have been dealt with.

Section of Repealed Acts.	Section of Consolidated Act.	Remarks.
5 Will. IV, No. 8, s.1, 2		Adopts 1 and 2 Will. IV, c. 58 and other Acts.
1 & 2 Will. IV, c. 58, s.1	4	Part of this section is inapplicable to New South Wales.
2	5	
3	6	
4	9	
5	7	
6	8	
7	10, 11	To be dealt with in Prohibition and Mandamus Bill.
8	.....	
7 Vic. No. 13, s. 7	8	

ACT No. VII., 1901.

An Act to consolidate the Statutes relating to Interpleader in the Supreme Court. [Assented to, 3rd October, 1901.]

BE it enacted by the King's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and Legislative Assembly of New South Wales in Parliament assembled, and by the authority of the same, as follows :—

PART I.

PRELIMINARY.

Short title and division.

1. This Act may be cited as the "Interpleader Act, 1901," and is divided into Parts as follows—

PART I.—PRELIMINARY—ss. 1–3.

PART II.—APPLICATIONS BY DEFENDANTS—ss. 4–7.

PART III.—APPLICATIONS BY SHERIFF AND OTHER OFFICERS—s. 8.

PART IV.—SUPPLEMENTARY—ss. 9–11.

Repeal Schedule

2. The Acts mentioned in the Schedule to this Act are, to the extent therein expressed, hereby repealed.

Interpretation.

3. In this Act,—

"Court" means the Supreme Court.

"Judge" means a Judge of the Court.

PART II.

S. 4.

APPLICATIONS BY DEFENDANTS.

4. Upon application made by or on the behalf of any defendant, sued in the Court in any action of assumpsit, debt, detinue, or trover, such application being made after declaration and before plea, by affidavit or otherwise showing—

Interpleader proceedings upon application of defendant.

1 & 2 Will. IV, c. 58, s. 1.

- (a) that such defendant does not claim any interest in the subject-matter of the action ;
 - (b) that the right thereto is claimed or supposed to belong to some third party who has sued, or is expected to sue for the same ;
 - (c) that such defendant does not in any manner collude with such third party ; and
 - (d) that such defendant is ready to bring into Court or to pay or dispose of the subject-matter of the action in such manner as the Court or Judge may order or direct,
- the Court or a Judge may—

- (i) by rule or order call upon such third party to appear and to state the nature and particulars of his claim, and to maintain or relinquish his claim ; and
- (ii) upon such rule or order hear the allegations as well of such third party as of the plaintiff ; and
- (iii) in the meantime stay the proceedings in such action ; and, finally,
- (iv) order such third party to make himself defendant in the same or some other action, or to proceed to trial on one or more feigned issue or issues ; and direct which party shall be plaintiff or defendant on such trial ; or, with the consent of the plaintiff and such third party, dispose of the merits of their claims, and determine the same in a summary manner ; and
- (v) make such other rules and orders therein as to costs and all other matters as appear just and reasonable.

Application.—The application may be either to the Court or a Judge. If made to the Court the application (according to the form of order : Chitty's Forms, 817) is for an order *nisi* calling on the plaintiff and the claimant to show cause why he should not appear, &c.

The usual practice is to take out a chamber summons signed by a Judge, supported by a proper affidavit (*v. Affidavit, infra*) ; (form of summons : Chitty's Forms, 819) calling on the plaintiff and the claimant to appear in Chambers, and show cause why the claimant should not appear and state his claim, &c. : see Chitty's Forms, 819.

In any action.—But the Crown cannot be made to interplead not being named in the Statute : *Candy v. Maughan*, 1 D. & L. 745 ; where, however, the Crown as execution creditor assented to the order and the issue was found in favour of the claimant, the Crown was held to have submitted to the ordinary consequences, and was made to pay costs : *Minister for Lands v. Nestrom*, (1900) 17 W.N. 68. Whether a foreigner beyond the jurisdiction can be required to interplead, *quære* : *Patroni v. Campbell*, 12 M. & W. 277 ; see *Belmonte v. Aynard*, 4 C.P.D. 221, 352 ; *Credits Gerundense v. Van Weede*, 12 Q.B.D. 171 ; *Re Busfield*, 32 C.D. 123.

Where there were two actions in different Courts (in England) application had to be made in each : *Allen v. Gilby*, 3 Dowl. 143.

After declaration and before plea.—The application may apparently be made after further time to plead has been obtained : Chitty's Archbold, 1396.

Affidavit.—The affidavit must be made by the defendant or some other person who knows the facts ; and must state as in (a) (b) (c) and (d), *supra*, and any other material facts : see form, Chitty's Forms, 816.

S. 4.

Interest.—As to (a) see *Braddick v. Smith*, 9 Bing. 84; *Slaney v. Sydney*, 14 M. & W. 800.

Lien.—A lien claimed by the defendant on the subject matter may exclude the remedy: *Braddick v. Smith*, 9 Bing. 84; but see *Cotter v. Bank of England*, 2 Dowl. 728; *Best v. Hayes*, 32 L.J. Ex. 129; 1 H. & C. 718.

Collusion.—As to (c) the affidavit must deny collusion with either plaintiff or claimant: *Belcher v. Smith*, 9 Bing. 82; *Tucker v. Morris*, 1 Cr. & M. 73; 1 Dowl. 639; but the claimant who is a party to the collusion cannot take the point: *Thompson v. Wright*, 13 Q.B.D. 632. Defendant taking an indemnity from one side cannot claim relief: *Tucker v. Morris*, *supra*.

Applicant in possession.—As to (d) in order that the applicant may be in a position to bring the subject matter into Court, it must appear that he is in possession of it, and thus able to obey any order of the Court that may be made about it: *Inland v. Buskell*, 5 Dowl. 147; *Darcy v. Fielder*, (1888) 4 W.N. 155, seems to be a decision on this point.

Whether a defendant can interplead as to part, *quære*: *Reading v. School Board for London*, 16 Q.B.D. 686.

Third party to state particulars of claim.—It has been held in Sheriff's interpleader that the claimant must verify his claim on affidavit produced in Court: *Chitty's Archbold*, 1407; *Younger v. Csarlinski*, (1895) 12 W.N. 30; though *Foster, J.*, made an order subject to the filing of an affidavit: *Jeannerett v. Mills*, (1891) 7 W.N. 92. It seems advisable always to file an affidavit; see *Chitty (supra)* and *Powell v. Lock*, 3 A. & E. 315.

The claimant may be restricted on the trial of the issue to his claim as disclosed on the affidavit: *Thompson v. De Lissa*, (1881) 2 N.S.W.R. 165.

If the claimant does not appear his claim may be barred: s. 6, *infra*, and notes.

The order.—Assuming that the defendant has made a *prima facie* case by affidavit as above mentioned, yet the order will be made only under certain circumstances. The same question must be raisable on the interpleader issue as was in dispute between the original parties: *Baker v. Bank of Australasia*, 1 C.B. N.S. 615; 26 L.J.C.P. 93; but see *Lucas v. London Dock Co.*, 4 B. & Ad. 378; *Tanner v. European Bank*, L.R. 1 Ex. 261.

If it appear upon the application that the applicant is under a special obligation towards either plaintiff or claimant in respect of the subject matter it was at one time held that the application must be refused, following the Equity Practice: *Crawshay v. Thornton*, 2 Myl. & Cr. 1; *Farr v. Ward*, 2 M. & W. 844; *James v. Pritchard*, 7 M. & W. 216; *Turner v. Mayor of Kendall*, 13 M. & W. 171; *Lindsay v. Barron*, 6 C.B. 291; *Horton v. Earl of Devon*, 4 Ex. 497; *Oriental Bank v. Nicholson*, 5 W.R. 587. But in England the rule was latterly somewhat relaxed even before the English C.L.P. Act 1860: *Johnson v. Shaw*, 4 M. & G., 916; 12 L.J.C.P. 112; *Crellin v. Leland*, 6 Jur. 733. Under that Act the rule had no application: *Meynell v. Angell*, 32 L.J.Q.B. 14; *Best v. Hayes*, 1 H. & C. 718; 32 L.J. Ex. 129; *Tanner v. European Bank*, L.R. 1 Ex. 261. Although that Act has never been adopted here, yet in *McGuinness v. Bank of New South Wales*, (1880) 1 N.S.W.R. 97, *Winder, J.*, made an order following the English cases last cited, and the Court confirmed that order on appeal, *ibid*. The question, however, came before the Full Court on appeal in *Lasarus v. Harris*, (1888) 9 N.S.W.R. 148; 4 W.N. 179; when the earlier cases were followed on the express ground that the provisions of the English C.L.P. Act, 1860, have not been adopted or enacted here; and so in *McLaughlin v. Pitt*, (1890) 6 W.N. 109, an order was refused on the same ground. Yet it is to be observed that in *Roberts v. Bell*, 7 E. & B. 323, a case before the Act of 1860, an order was made although the defendants were bailees of the subject matter in dispute from the claimant; and in *Best v. Hayes (ubi sup.)* though decided after the Act of 1860, yet the Judges of the Court of Appeal referred to the practice of the Court as existing before that Act, and as having before the Act departed from the old Equity rule; and did not rely on the Act for their decision; and see *Tanner v. European Bank*, L.R. 1 Ex. 261.

These cases were cited in *Nolan v. London Chartered Bank*, (1890) 6 W.N. 127, where an order was made; and see *Dawson v. Mutual Assurance Society of Victoria*, (1892) 9 W.N. 5; and in *Bray & another v. Bank of Australasia*, (1896) 13 W.N. 32, *Cohen, J.*, followed *Nolan v. London Chartered Bank (supra)*. But in *Calvert v. Duff*, (1903) 20 W.N. 15, where an agent who had effected a private sale of land, was sued by the purchaser for the deposit, *Pring, J.*, refused to make an interpleader order on the ground that the defendant was merely an agent for the vendor (the claimant).

In *Ison v. Stewart*, (1901) 18 W.N. 244, the defendant had borrowed the money in question, and was sued by plaintiff; the executors of plaintiff's deceased husband also claimed the money; order was refused.

§. 4.

It was further said that both claims must be of a legal and not an equitable character : *Sturgess v. Claude*, 1 Dowl. 505 ; *Roach v. Wright*, 8 M. & W. 155 ; the rule has, however, been doubted : *Putney v. Tring*, 5 M. & W. 425 ; and was not followed in *Frost v. Heywood*, 2 Dowl. N.S. 801. See also *Rusden v. Pope*, L.R. 3 Ex. 269, where the Court on a special case decided the equities between parties to an interpleader ; and *Gourlay v. Lindsay*, (1879) 2 S.C.R. N.S. 278 ; *Duncan v. Cashin* L.R. 10 C.P. 554 ; 44 L.J.C.P. 245.

Form of order.—For the form of the order see Chitty's Forms, 818. The claimant is ordered to make himself the defendant in the same or some other action, or a feigned issue is ordered. As to Sheriff's interpleader, s. 8, (post).

"Issue" means in the Supreme Court : *Castlemaine Brewery Co. v. Howell*, (1887) 3 W.N. 108 ; and an issue can only be sent to the District Court by consent, *ibid.* ; but *Windeyer, J.*, ordered trial in the District Court against the wish of one of the parties : *Roberts v. Weston*, (1891) 8 W.N. 53.

If an issue is sent to the District Court, the Judge should find both the law and the facts : *Miller v. Carey*, (1892) 9 W.N. 24.

The dates for the delivery of the issue and the return of the same are fixed by the order. Where the execution creditor did not return the issue within the time fixed, the order was vacated, he was barred from further proceeding and ordered to pay costs : *Godfrey v. Ball*, (1897) 14 W.N. 75. Where the execution creditor had been directed by the order to proceed to the trial of the issue at the earliest possible day, but he had neglected to do so, he was, on the application of the claimant, barred from further prosecuting the action ; and a bond given by the plaintiff as security was ordered to be given up to be cancelled : *Levy v. Mollison*, (1864) 3 S.C.R. 81. The time for the return of the issues on an order cannot be extended after the term fixed has expired : *National Bank v. Goodsell*, (1890) 7 W.N. 4. And where the issue ordered was to decide the question to whom the goods belonged at the time of the delivery of the writ to the Sheriff, and security was ordered to be given within seven days ; the claimant coming after sixteen days to vary the order was held to be too late, no security having been given : *Smith v. Farrelly*, (1893) 9 W.N. 113.

A claim in alternative rights may be set up and an issue ordered accordingly : *E.S. & A.C. Bank v. Gill*, (1886) 2 W.N. 103.

The order should provide for the interim protection of the matter in dispute ; in the case of money, by requiring it to be brought into Court : *Allen v. Gilby*, 3 Dowl. 143.

Special orders may be made putting some of the parties on terms as to the trial of the issue ; as in *Nolan v. London Chartered Bank*, (1890) 6 W.N. 127, where the claimant being made defendant was forbidden to plead *non detinet* ; or as in *Chisholm v. Richardson*, (1876) 14 S.C.R. 334, the application (defendant) may be ordered to give plaintiff security for costs of the action ordered against claimant.

Summary decision.—The Court or Judge may by consent determine the questions in dispute summarily, as in *Richards v. Grunow*, (1886) 3 W.N. 31 ; *Debney v. Petre*, (1887) 4 W.N. 51 ; *Lipscomb v. Bell*, (1881) T.T.R. 14 (2nd Term).

Costs.—The costs generally as between the claimant and the plaintiff are in the discretion of the Judge, and are disposed of after and ordinarily in accordance with the event : *Melville v. Smark*, 3 M. & G. 57 ; *Casel v. Parienti*, 7 M. & G. 527. If one party is partly successful, the Judge will exercise his discretion ; if he has succeeded except as to a very trifling part, he will be allowed his costs ; if he only succeeds as to a trifling part he may be ordered to pay costs : Chitty's Archbold, 1399. Where a claimant succeeded as to one article out of several, and failed as to the rest, he was allowed costs relating exclusively to that one article, but had to pay the general costs of all proceedings : *National Bank v. Goodsell*, (1890) 7 W.N. 60. Where claimants were entitled to about half the goods, but claimed the whole, and the balance more than sufficed to answer the judgment debt, they were ordered to pay all costs occasioned by the interpleader : *Morrissey v. Tamworth Printing Co.*, (1884) 1 W.N. 16. Where claimant claimed eight horses and succeeded as to three, costs of the feigned issue were apportioned accordingly, and no other costs allowed : *Riordan v. Polson*, (1891) 8 W.N. 53. Where claimant succeeded as to £50 out of £56, ordered that claimant should have the costs of the summons, each party the costs of the issue so far as each succeeded (to be set off), and the costs of the then present application in similar proportion : *Little v. Scadden*, (1896) 13 W.N. 63 ; the taxation in this case was the subject of appeal : 13 W.N. 114. Where the execution creditor abandoned the proceedings, the claimant was entitled to his costs : *Allt v. Roberts*, (1887) 3 W.N. 108. Where after order made the execution creditor declined to go on he was ordered to pay claimant's costs : *Short v. White*, (1893) 9 W.N. 105.

8. 4.

The cases preceding are cases of Sheriff's interpleader ; but there seems to be no distinction as to costs ; and see *Chitty's Archbold*, 1399, 1400.

On interpleader in the Small Debts Court the magistrate ordered the claimant, though successful, to pay plaintiff's costs and certain bailiff's fees ; *held*, on prohibition, that he had jurisdiction to so order : *Ex parte Permanent Trustee Co.*, (1897) 14 W.N. 61.

Costs of defendant applicant.—If the applicant acts *bona fide* he will in general in the first instance be allowed his costs of the application out of the fund in dispute, to be ultimately paid by the unsuccessful party : *Chitty's Archbold*, 1399 ; *Bray v. Bank of Australasia*, (1896) 13 W.N. 32. Though where the applicant was offered an indemnity and refused it, the Court refused to allow him his costs : *Gladstone v. White*, 1 *Hodges*, 386. Even if the party in the wrong fails to proceed, the applicant will have his costs out of the fund, leaving the successful party to recover them from the other party : *Pitchers v. Edney*, 4 *Bing*, N.C. 721.

If the claimant does not appear on the interpleader summons, he cannot be ordered to pay costs : *Jones v. Lewis*, 8 M. & W. 264 ; *Wilson v. Christie*, (1895) 12 W.N. 34 ; but *Stephen, J.*, ordered costs against the claimant : *Norman v. Ormiston*, (1902) 19 W.N. 12.

Judgment and decision to be final.

1 & 2 Will. IV, c. 58, s. 2.

5. The judgment in any such action or issue as may be directed by the Court or Judge, and the decision of the Court or Judge in a summary manner, shall be final and conclusive against the parties and all persons claiming by, from, or under them.

But there is no difference between interpleader issues and other actions as regards the circumstances under and terms on which new trials will be granted where the verdict is against evidence : *James v. Whitbread*, 20 L.J.C.P. 217 ; and probably this would here apply to a motion for a new trial on any ground, although in England it was held that error could not be taken on a judgment on a feigned issue under the English Interpleader Act : *King v. Simmonds*, 14 L.J.Q.B. 248 ; 7 Q.B. 289.

A single Judge in vacation has power to vary an interpleader order made by himself : *Griffiths v. McGrath*, (1888) 5 W.N. 12.

Claim of third party may be barred on his non-appearance or non-compliance with order.

Ibid. s. 3.

6. If such third party—

(a) having been duly served with such rule or order does not appear thereupon to maintain or relinquish his claim ; or

(b) neglects or refuses to comply with any rule or order made after his appearance,

the Court or Judge may—

(i) declare such third party and all persons claiming by, from, or under him, to be for ever barred from prosecuting his claim against the original defendant, his executors or administrators, saving, nevertheless, the right or claim of such third party against the plaintiff ; and

(ii) thereupon make such order between such defendant and the plaintiff as to costs and other matters as appears just and reasonable.

As to costs against claimant not appearing, see *Jones v. Lewis*, 8 M. & W. 264 ; *Wilson v. Christie*, 12 W.N. 34 ; *Norman v. Ormiston*, 19 W.N. 12, cited notes to s. 4, (*ante*).

Neglect or refuse.—See notes to s. 4, (*ante*).

Judge may refer matter to Court.

Ibid. s. 5.

7. (1) If a Judge, upon application to him in the first instance, or in any later stage of the proceedings thinks the matter more fit for the decision of the Court, he may refer the matter to the Court.

(2) The Court shall thereupon hear and dispose of the matter in the same manner as if the proceeding had originally commenced by rule of Court instead of by order of a Judge.

PART III.

S. 8.

APPLICATIONS BY SHERIFF AND OTHER OFFICERS.

8. (1) When any claim to any goods or chattels taken or intended to be taken in execution under any process issued by or under the authority of the Court, or to the proceeds or value thereof, is made by a person not being the party against whom such process has issued, the Court or a Judge, upon the application of the Sheriff or other officer made before or after the return of such process, and before or after any action brought against such Sheriff or officer may—

Interpleader proceedings upon application of Sheriff, &c.

1 & 2 Will. IV, c. 58, s. 6.
7 Vic. No. 13, s. 7.

(a) by rule or order call before the Court or a Judge the party issuing the process and the person making the claim; and

(b) thereupon exercise for the adjustment of such claim and the relief and protection of the Sheriff or other officer all or any of the powers and authorities hereinbefore contained, and make such rules, orders, and decisions as appear to be just according to the circumstances of the case.

(2) The costs of all such proceedings shall be in the discretion of the Court or Judge.

The practice and principles noted under the preceding sections apply generally in interpleader on the application of the Sheriff, subject to the following observations :

A Sheriff may successfully apply for an interpleader order, although no action has been commenced against him, provided that a *bona fide* legal claim has been actually made to goods lawfully seized (*Holton v. Guntrip*, 3 M. & W. 145) by him (*Isaac v. Spilsbury* 10 Bing. 3; *Green v. Brown*, 3 Dowl. 337); a claim by a partner (*qua* partner) was not within the Act: *Holmes v. Mentze*, 4 Ad. & E. 127; see *Larkin v. Graham*, (1883) 4 N.S.W.R. 65. But now as to execution against partnership property see s. 23 of the Partnership Act, 55 Vic. No. 12.

Notice of other writs is not such a claim: *Salmon v. James*, 1 Dowl. 369; *Day v. Waldock*, *ibid.* 523. As to Bankruptcy, see the Bankruptcy Act, 1898, ss. 53, 54, and *Heathcote v. Linsley*, 19 Q.B.D. 285. As between the execution creditor and a claimant other than the official assignee on the judgment debtor becoming insolvent under the Insolvency Acts, see *Harris v. Solomon*, (1879) 2 S.C.R. N.S. 207; *London Chartered Bank v. Dunncliffe*, (1887) 4 W.N. 40; *Castlemaine Brewery Co. v. Howell*, (1887) 4 W.N. 64; *Ex parte Hickey*, Foster D.C.P. App. 268. Under the Bankruptcy Acts, *Foster, J.*, held in *National Bank of Australasia v. Goodsell*, (1890) 7 W.N. 60, that bankruptcy of the judgment debtor does not of itself, without an order of the Court, stay the interpleader proceedings; and this was followed by the Full Court in *Tuffin v. Joyce*, (1899) 16 W.N. 97.

The Sheriff is not entitled to call upon a claimant to interplead where the former has committed some injury distinct from the mere seizure of the goods: *Hollier v. Laurie*, 3 C.B. 334; but see *Winter v. Bartholomew*, 11 Ex. 704; and *Mercer v. Stanbury*, 25 L.J. Ex. 316; and here it may be noticed that the acceptance by the execution creditor of an issue is not an affirmation of previous torts committed by the Sheriff *Woollen v. Wright*, 1 H. & C. 554; 32 L.J. Ex. 513. Where goods have been wrongfully seized under a *fi. fa.* and are afterwards sold under an interpleader order, the execution creditor is not liable for any loss that may accrue by such sale, or by any proceedings subsequent to the interpleader order: *Walker v. Olding*, 1 H. & C. 621.

The Sheriff is entitled to interplead after an action has been commenced against him by the claimant for unliquidated damages for trespass and negligence; and the Judge may in his discretion make an order staying such action: *Sullivan v. Perrot*, (1901) 18 W.N. 3.

The Sheriff need not by his affidavit deny collusion: *Bond v. Woodhall*, 4 Dowl. 351. But the Sheriff may disentitle himself to relief by collusion, or by taking an indemnity: *Ostler v. Bower*, 4 Dowl. 605; *Bradstock v. Campbell*, (1900) 16 W.N. 238; or by being interested personally or by his under-sheriff: *Ostler v. Bower*, *supra*; or where he has himself brought the claim about: *Cox v. Balne*, 2 D. & L. 718; or where he has acted upon his own discretion in the matter of the dispute

S. 8.

Crump v. Day, 4 C.B. 760 ; *Tufton v. Harding*, 29 L.J. Ch. 225 ; (but see *Holt v. Frost*, 3 H. & N. 821) ; or where he has been negligent : *Brackenbury v. Laurie*, 3 Dowl. 180 ; or where the application is unreasonably delayed : *Mutton v. Young*, 4 C.B. 371 ; *Tufton v. Harding*, *supra* ; and see *Bagshaw v. Farnsworth*, 2 L.T. N.S. 390.

If the Sheriff abandons he disentitles himself to relief : *Guy v. Ambrose*, (1887) 3 W.N. 136 ; but see *Cohen v. Burke*, (1885) 1 W.N. 144.

A special bailiff appointed under the Act 7 Vic. No. 13, s. 2, now the Sheriff Act, 1900, s. 10 (*post*), can interplead : *Levy v. Hart*, (1868) 7 S.C.R. 142.

The execution creditor is entitled to be defendant upon the issue and may set up a *jus tertii* against the claimant : *Richards v. Jenkins*, 18 Q.B.D. 451 ; see *Usher v. Martin*, 24 Q.B.D. 272.

Proceedings against the Sheriff will be stayed pending the issue, and are usually barred altogether by the order : see *Sullivan v. Perrot*, (1901) 18 W.N. 3.

If the execution creditor does not appear upon the Sheriff's application to interplead, the Sheriff will be ordered to withdraw, or to pay over the proceeds of the goods if sold ; and he will be protected against any claim of the execution creditor in respect thereof : *Eveleigh v. Salisbury*, 3 Bing. N.C. 298 ; but the execution creditor will not be liable to costs in ordinary cases ; but see *Allt v. Roberts*, (1887) 3 W.N. 108.

Where the claimant fails to appear his claim to the goods and against the Sheriff will be barred ; but any remedy that he may have against the execution creditor will be left open : *Ford v. Dilly*, 5 B. & Ad. 885 ; and he will not be liable to costs.

The costs are in the discretion of the Judge and are ordinarily disposed of after the claim has been abandoned or otherwise finally determined ; and generally follow the event : *Staley v. Bedwell*, 10 A. & E. 145 ; and see notes to s. 4, *Costs*. If the Sheriff does not successfully support his application, it may, and often will, be dismissed with costs : *Anderson v. Calloway*, 1 C. & M. 182 ; *Re Sheriff of Oxfordshire*, 6 Dowl. 136. He will rarely be allowed any costs, because the relief sought is purely beneficial to himself : *Cox v. Fenn*, 7 Dowl. 50 ; *Jones v. Lewis*, 8 M. & W. 264.

The right of the Sheriff to poundage fees and expenses of execution is dependent upon the validity of the seizure ; and therefore abides the event of the claim : *Clark v. Chetwode*, 4 Dowl. 635 ; but he may entitle himself to possession money for possession after the order, either by consent, or by order of the Judge : *Dobbs v. Humphries*, 1 Bing. N.C. 412 ; *Bland v. Delane*, 6 Dowl. 293 ; *In re Creagh and Williams*, (1890) 6 W.N. 141 ; and where the parties, after an issue has been directed, come to an arrangement, he is entitled to possession money from the date of the order : *Scales v. Sargeson*, 4 Dowl. 231 ; and if the execution creditor recovers any portion of his debt the Sheriff may be entitled to his charges *pro tanto*.

Where a married woman was the claimant, a verdict that the goods were hers as against the execution creditor has been supported : *Bird v. Crabb*, 30 L.J. Ex. 318 ; *Gourlay v. Lindsay*, (1879) 2 S.C.R. N.S. 278.

After verdict for the execution creditor it is the practice, though, *semble*, unnecessary, for the Sheriff to obtain an order to sell : *Burns v. Dalzell*, (1887) 4 W.N. 81.

The Sheriff's seizure takes effect at the earliest hour of the day on which it is made : *Thompson v. De Lissa*, (1881) 2 N.S.W.R. 165.

The question to be tried is to whom did the goods belong at the time of the seizure : *Levy v. Hart*, (1868) 7 S.C.R. 142 ; *Chitty's Forms*, 824.

Where the execution debtor had a stallion leased to him for the season, *held*, that the Sheriff could not sell such an interest : *Wood v. O'Shea*, (1893) 10 W.N. 68.

PART IV.

SUPPLEMENTARY.

Appeal from
order of a
Judge.
1 & 2 Will. IV,
c. 58, s. 4.

9. Every order made in pursuance of this Act by a single Judge not sitting in open Court shall be liable to be rescinded or altered by the Court in like manner as other orders made by a single Judge.

Rules, &c., may
be entered of
record.
Ibid. s. 7.

10. (1) All rules, orders, matters and decisions made and done in pursuance of this Act, except only the affidavits filed, may, together with the declaration in the cause, if any, be entered

of record with a note in the margin expressing the true date of such entry to the end that the same may be evidence in future times if required, and to secure and enforce the payment of costs directed by any such rule or order. **S. 10.**

(2) Every such rule or order so entered shall have the force and effect of a judgment except only as to becoming a charge on any land.

Force and effect of a judgment : but see *Best v. Pembroke*, L.R. 8 Q.B. 363.

11. (1) If any such costs are not paid within fifteen days after notice of the taxation and amount thereof given to the party ordered to pay the same, or his agent or attorney, execution may issue for the same together with the costs of such entry and of the execution. Execution for costs.
1 & 2 Will. IV c. 58, s. 7.

(2) Every such writ may bear teste on the day of issuing the same whether in or out of term.

(3) The Sheriff or other officer executing any such writ shall be entitled to the same fees and no more as upon a similar writ grounded upon a judgment of the Court.

SCHEDULE.

Reference to Act.	Title.	Extent of Repeal.
5 Will. IV, No. 8.	An Act for adopting and applying certain Acts of Parliament passed in the eleventh year of the reign of his late Majesty and first year of the reign of his present Majesty and in the first and second years of the reign of his present Majesty respectively in the administration of justice in New South Wales in like manner as other laws of England are applied therein.	The whole in so far as it applies to sections 1 to 7, inclusive, of the Act 1 & 2 Will. IV c. 58.
1 & 2 Will. IV, c. 58	An Act to enable Courts of law to give relief against adverse claims made upon persons having no interest in the subject of such claims.	The whole, except section 8.
7 Vic. No. 13 ..	An Act for regulating the appointment and duties of Sheriff in New South Wales.	The unrepealed portion.

S. 1.

INTER-STATE DEBTS RE- COVERY ACT 1901.

TABLE

Showing how the sections of Acts consolidated have been dealt with.

Section of Repealed Acts.	Section of Consolidated Act.	Remarks.
19 Vic. No. 12, s. 1	6	
2	7	
3	8-11	
52 Vic. No. 23, s. 1	3, 4	
2	5	
3	12, 13	
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6	16-18	
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ACT No. XLVIII., 1901.

An Act to consolidate the Acts relating to the enforcement in New South Wales of Judgments obtained in other Australian States or New Zealand, and the recovery of judgments against debtors who have removed thereto from New South Wales. [Assented to, 13th November, 1901].

BE it enacted by the King's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and Legislative Assembly of New South Wales in Parliament assembled, and by the authority of the same, as follows :—

PART I.

PRELIMINARY.

1. This Act may be cited as the "Inter-state Debts Recovery Act, 1901," and is divided into Parts, as follows :—

PART I.—PRELIMINARY—ss. 1-5.

PART II.—ENFORCEMENT OF INTERSTATE SUPREME COURT JUDGMENTS—ss. 6-11.

PART III.—DISTRICT COURT PROCEEDINGS AGAINST PERSONS OUT OF THE JURISDICTION—ss. 12-15.

Short title and
division

PART IV.—CERTIFYING DISTRICT COURT JUDGMENTS FOR ENFORCEMENT OUT OF THE JURISDICTION—ss. 16–19. **§. 1.**

PART V.—ENFORCEMENT OF INTERSTATE JUDGMENTS OF LOCAL COURTS—ss. 20–25.

2. (1) The Acts mentioned in the First Schedule hereto are hereby repealed. Repeal.
First Schedule.

(2) All proclamations heretofore made, and all proceedings heretofore taken under any Act hereby repealed, shall be deemed to have been made and taken hereunder.

3. In this Act, unless the context or subject-matter otherwise indicates or requires,— Interpretation.
19 Vic. No. 12,
s. 1.

“Clerk” means clerk, registrar, or other proper officer of the court in connection with which the term is used. 52 Vic. No. 23,
s. 1.

“Judgment” in Part II means a judgment, decree, rule, or order, whereby any sum of money is made payable.

“Local court” includes district court and any inferior court being a court of record, and having jurisdiction in actions of debt or for a liquidated sum to the amount of two hundred pounds.

“State” means a State of the Commonwealth of Australia or the colony of New Zealand.

4. This Act, except Part II thereof, shall be read with the District Courts Act, 1901. Act to be read
with District
Courts Act.
Ibid.

5. (1) If in any State there be any law in force by which effect may be given by the local courts thereof to the judgments of the district courts of New South Wales, the Governor may by proclamation declare that the provisions of this Act shall apply to the judgments of the local courts of such State, and that process issuing out of such local courts may be served in New South Wales, and that certificates of judgment obtained in district courts in New South Wales may, at the request of the judgment creditors, be forwarded to such State. Governor may
apply Act to
any State in
which a similar
Act is in force.
52 Vic. No. 23,
s. 2.

(2) Thereupon the provisions of this Act shall so apply, and the registrars of district courts shall, subject to the provisions of this Act, give certificates of judgments obtained in such courts for registration in the local courts of such State.

(3) This section shall not apply to Part II of this Act.

PART II.

ENFORCEMENT OF INTERSTATE SUPREME COURT JUDGMENTS.

6. (1) Any person in whose favour a judgment has been obtained in the Supreme Court of any State may cause a memorial of the same, authenticated by the seal of such court, to be filed in the office of the Supreme Court of New South Wales. Memorial of
judgment of
Supreme Court
of any State
may be filed of
record.
19 Vic. No. 12
s. 1.

(2) Such memorial shall thenceforth be a record of such judgment.

Judgment.—The judgment must be final and not merely interlocutory: *Splatt v. Splatt*, (1885) 2 W.N. 18; *Splatt v. Splatt*, (1889) 10 N.S.W.R. 227; 6 W.N. 58.

8. 7.

Form and contents of memorial.

19 Vic. No. 12, s. 2.

7. Such memorial shall be on parchment and signed by the person in whose favour such judgment was obtained, or by his attorney, and shall contain the following particulars, all of which shall be fairly written without interlineations or erasures and with the exception of dates in words at length, that is to say—

- (a) the names and additions of the parties ;
- (b) the form and nature of the action or suit or other proceeding ;
- (c) when the same was commenced ;
- (d) the date of the signing or entering up of the judgment, or of passing the decree, or of making the rule or order ;
- (e) the amount recovered, or the decree pronounced, or rule or order made ;
- (f) if there was a trial, the date of such trial and the amount of verdict given.

Signed by.—The signature need not be verified by affidavit : *Warner v. Fischer*, (1875) 13 S.C.R. 346.

Attorney.—The memorial of a foreign judgment cannot be signed by a firm of attorneys, but must be signed by the attorney on the record ; The word "attorney" in this section does not mean person acting under a power of attorney, but means the attorney on the record : *Hickie v. Carrol and another*, (1894) 15 N.S.W.R. 113 ; 10 W.N. 207.

The attorney is the attorney in the other state, see *Heussler v. Rohde*, (1890) 6 W.N. 129.

Written.—The provisions of this section requiring the statement of the particulars to be written in words at length are imperative : *Bank of New Zealand v. Proudfoot* (1885), 6 N.S.W.R. 177 ; 2 W.N. 14 ; *Splatt v. Splatt* (1885), 2 W.N. 18.

Names and additions.—The names of the parties must appear : *Brown v. Holmes*, (1888) 4 W.N. 191.

The additions must also be stated in the memorial, otherwise the Court will not allow execution to issue : *Berry v. Shead*, (1886) 7 N.S.W.R. 39 ; 2 W.N. 54 ; *Young v. Hicks*, (1886) 3 W.N. 53 ; *Higgott v. Lyon and others*, (1894) 10 W.N. 130.

The form and nature of the action.—In *Gillman v. Holmes*, (1888) 4 W.N. 190, the memorial stated under the heading "The form and nature of the action" that the judgment was obtained "on a judgment of the County Court at Sandhurst and commenced in the Supreme Court of Victoria on the 14th day of July 1887 ;" and the same day was named as the date of the judgment and the date of the commencement of the action. Objections were taken first that the "form and nature of the action" were not sufficiently stated in accordance with the provisions of the section, and secondly that the memorial was inaccurate in giving the same day as the date of the commencement of the action and the date of the judgment. Both objections were upheld as fatal.

Amount recovered.—The amounts must be in words, at length : *Splatt v. Splatt*, (1885) 2 W.N. 18 ; *Bank of N.Z. v. Proudfoot*, 6 N.S.W.R. 177 ; 2 W.N. 14.

Summons to show cause.
Ibid. s. 3.

8. (1) Any Judge of the Supreme Court of New South Wales, upon the application of the person in whose favour such judgment was obtained, or of his attorney, may issue a summons calling upon the person against whom such judgment was obtained to show cause, within such time after personal or such other service of the summons as the Judge directs, why execution should not issue upon such judgment.

(2) Such summons shall give notice that, in default of appearance, execution may issue accordingly.

Person in whose favour, etc. . . . or his attorney.—In *Victorian Phillip-Stephan Co. v. Davis*, (1890) 11 N.S.W.R. 257 ; 7 W.N. 9, the application was made

by the Sydney attorney, describing himself as agent for the Victorian attorneys of the plaintiffs; the point was taken that he was not attorney for the plaintiffs, but no decision was given, the point being apparently abandoned.

8. 8.

Why execution should not issue.—The granting or withholding leave to issue execution is in the discretion of the Court or the Judge to whom the application is made, and in exercising the power given by this Act, the Court or Judge should be guided by the same principles as would guide an English Court in an action upon a foreign judgment, and the same considerations as would prevent an English Court from giving effect to a foreign judgment ought to prevent a Judge of this Court from granting an application to issue execution made under this Act: *The Brisbane Oyster Fishery Co. v. Emerson*, (1877) Knox 80; *Bank of New Zealand v. Proudfoot*, (1885) 6 N.S.W.R. 177. See as to the cases in which a foreign Court has jurisdiction: *Sirdar Singh v. Rajah of Faridkote*, (1894) A.C. 670. This principle is acted on through a long series of cases each turning on its own particular facts, the question generally being whether the defendant had done anything to bring himself within the jurisdiction of the Court in which the judgment had been obtained: see *Warner v. Fischer*, (1875) 13 S.C.R. 346; *Johnson v. Poole*, (1877) Knox 394; *Sargood v. Charasse*, (1881) T.T.R. 13 (2nd Term); *Mainwaring v. Mercer*, (1881) T.T.R. 44; *The Glanmore and Monkland G.M. Co. v. Buckland*, (1884) 1 W.N. 92; *Berry v. Shead*, (1886) 7 N.S.W.R. 39; 2 W.N. 54; *Herman v. McQuade*, (1886) 3 W.N. 64; *James v. Jameson*, (1887) 3 W.N. 114; *Baird v. Bell*, (1887) 4 W.N. 17; *Splatt v. Splatt*, (1889) 10 N.S.W.R. 227; *Victorian Phillip-Stephan Co. v. Davis*, (1890) 11 N.S.W.R. 257; 7 W.N. 9; *Smith v. Campbell*, (1890) 7 W.N. 10; *Herman v. Meallin*, 8 W.N. 38; *L. C. Bank of Australia v. McEdward*, (1894) 10 W.N. 195; *Bank of New Zealand v. Lloyd*, (1898) 14 W.N. 160.

Married women.—In *Marks v. Casey*, (1890) 7 W.N. 35, leave was refused to issue execution against a married woman here, her husband not having been joined, though the judgment was regularly obtained in Victoria. And in *Dean v. Rising Moon G.M. Co.*, (1893) 10 W.N. 77, evidence having been given of the Victorian law as to the right of a married woman to sue in her own name, leave was granted to issue execution on a judgment obtained in Victoria by a married woman against a no-liability company registered in Victoria, but whose land was in New South Wales.

Voluntary appearance in a suit in a foreign jurisdiction gives the foreign Court jurisdiction: *Victorian Phillip-Stephan Co. v. Davis*, (1890) 11 N.S.W.R. 257; 7 W.N. 9.

Bankruptcy of defendant.—The bankruptcy of the defendant in the colony where the judgment was recovered has been held to be no bar to memorial issuing as it would not be a plea in bar to action on the judgment: *Bank of New Zealand v. Proudfoot*, *supra*.

Bankruptcy of plaintiff.—But the bankruptcy of the plaintiff prevented leave to issue the execution being granted, the proper course being first to take out a summons to revive the judgment and then a second summons for leave to issue execution: *Beere v. Czerwonka*, (1881) 2 N.S.W.R. 355.

Costs.—When the application is dismissed costs are always granted: *James v. Jameson*, (1887) 3 W.N. 114; but *aliter* when it is allowed: *Allen v. Birkby*, (1887) 4 W.N. 16; *Splatt v. Splatt*, (1889) 10 N.S.W.R. 227; 6 W.N. 58; though it was suggested by *Darley, C.J.*, that the costs might be recoverable as part of the costs of the execution: *Victorian Phillip-Stephan Co. v. Davis*, (1890) 11 N.S.W.R. 257; 7 W.N. 9, but not decided.

9. If the person so summoned does not appear or does not show sufficient cause against such summons, the Supreme Court, or a judge thereof, on due proof of such service as aforesaid, may order execution to issue as upon a judgment of such Court, subject to such terms and conditions, if any, as to such Court or judge may seem fit.

Order for issue of execution.
19 Vic. No. 12, s. 3.

Appeal lies to the Court from such an order of a judge: *Warner v. Fischer*, (1875) 13 S.C.R. 346.

Under special circumstances application may be made to the Judge to rescind his own order: *Beere v. Czerwonka*, (1881) 2 N.S.W.R. 355.

10. Thereupon, and subject thereto, the person entitled to such execution shall have and be entitled to all such process and to

Execution thereon
Ibid.

- 8. 10.** all such rights and remedies for the enforcement thereof, and the person against whom such execution is ordered shall in like manner be entitled to all such protective rights and advantages as they would respectively have been entitled to had such judgment been obtained in the Supreme Court.

In *Re a Bankruptcy notice*, (1898) 8 B.C. 26, A. H. Simpson, J., decided that a bankruptcy notice might issue on a memorial of judgment, leave having been obtained to issue execution : see *Re Richards*, (1902) 19 W.N. 152.

Revivor, &c.
19 Vic. No. 12,
s. 3.

- 11.** All such proceedings may be had or taken for the revival of such judgment or the enforcement thereof by and against persons not parties thereto as may be had or taken for the like purposes upon any judgment of the Supreme Court.

Revival.—See *Beere v. Czerwonka*, (1881) 2 N.S.W.R. 355.

PART III.

DISTRICT COURT PROCEEDINGS AGAINST PERSONS OUT OF THE JURISDICTION.

District Court
summons may
be served out of
jurisdiction.

52 Vic. No. 23,
s. 3.

- 12.** Any summons issued under the authority of the District Courts Act, 1901, for a debt or liquidated demand in money, whether on balance of account or otherwise, not exceeding in the whole the sum of two hundred pounds (if such summons bear an endorsement under the seal of the district court whence it issues to the effect that it is for service out of the jurisdiction), may be served out of the jurisdiction.

Affidavit to be
filed.

Second Schedule
Ibid.

- 13. (1)** Before any such summons is so endorsed and sealed, the plaintiff or some person on his behalf, shall file an affidavit, in the form in the Second Schedule hereto or to the like effect, stating,—

- (a) that the defendant is resident out of the jurisdiction ;
- (b) that the plaintiff has a good cause of action which arose within the jurisdiction ;
- (c) the nature of the same ;
- (d) the amount sought to be recovered ;
- (e) that the claim is for a debt or a liquidated demand in money not exceeding in the whole the sum of two hundred pounds, or that if it originally exceeded that sum it has been reduced, by payment or admitted set-off or by abandonment of excess, to a sum not exceeding two hundred pounds ;
- (f) what is believed to be the defendant's then place of residence and the distance in miles (approximately) of such place of residence from the Court whence such summons is issued.

and prima facie
case proved.
Ibid. s. 3.

(2) Proof shall also be given to the satisfaction of—

- (a) the judge of the district court whence such summons issues, or
- (b) a stipendiary or police magistrate acting for the district in which such district court is holden, or

- (c) a justice of the peace for New South Wales, if there is no such magistrate, **S. 13.**

that prima facie, a good cause of action exists, and that apparently justice will be done by allowing the summons to be so endorsed and sealed and the plaintiff to proceed under this Act.

14. (1) Every such summons shall be served personally, and proof of such service shall be made by affidavit before a justice of the peace of the State in which such summons was served, or before a commissioner for taking affidavits in the Supreme Court of New South Wales resident in such State. Personal service of summons.
52 Vic. No. 23, s. 4.

(2) But if it be made to appear to the judge of the district court whence any such summons issued,—

- (a) that reasonable efforts were made to effect personal service thereof upon the defendant, and that it came to such defendant's knowledge, and that he wilfully neglects to appear to such summons, or When personal service may be dispensed with.
Ibid.

(b) that the defendant has removed, or is living, out of the jurisdiction in order to defeat or delay his creditors or deprive the plaintiff of the relief to which he is entitled, such judge may, on the application of the plaintiff, order that personal service may be dispensed with, and that the plaintiff shall be at liberty to proceed in the action in such manner and subject to such conditions as to such judge may seem fit, although the summons has not been served personally upon the defendant.

(3) Thereupon the plaintiff may proceed in the action against such defendant accordingly.

15. (1) Where the defendant resides within twenty miles of the district court at which any summons issued for service out of the jurisdiction is returnable, such summons shall be issued six clear days, and served four clear days at least, before the return day thereof. Time for issue, service and return of summons.
Ibid. s. 5.

(2) Where he resides beyond twenty and within fifty miles of such court, such summons shall be issued eight clear days, and served six clear days at least, before the return day thereof.

(3) Where he resides beyond fifty miles from such court, the respective periods to elapse between the issue and the service of the summons and the return day thereof shall be fixed by the judge of such court or stipendiary or police magistrate or justice as aforesaid after the affidavit aforesaid has been filed and before the issue of the summons, and in fixing such periods regard shall be had to the distance of the place of residence of the defendant from such court.

PART IV.

CERTIFYING DISTRICT COURT JUDGMENTS FOR ENFORCEMENT OUT OF THE JURISDICTION.

16. Any person who obtains a judgment in any action in any district court may file with the registrar of such court an affidavit in the form of the Third Schedule hereto or to the like effect, by himself or some person on his behalf cognizant of the facts, stating— Affidavit of judgment, &c.
Ibid. s. 6.
Third Schedule.

- S. 16.**
- (a) that a judgment has been obtained in such court in respect of a cause of action which arose within the jurisdiction, for a debt or a liquidated demand in money ;
 - (b) the nature of the cause of action ;
 - (c) the amount recovered ;
 - (d) that the time for appealing has expired, and that no appeal is pending ;
 - (e) that such judgment is still in full force and remains unsatisfied (or if partly satisfied, to what extent, and the amount or balance remaining due and unsatisfied) ; and
 - (f) that the person against whom such judgment was recovered is resident out of the jurisdiction.

Notice to
registrar.
62 Vic. No. 23,
s. 6.
Fourth
Schedule.

17. Any such person obtaining a judgment as aforesaid may, after such affidavit has been filed, deliver to such registrar a notice, in the form in the Fourth Schedule hereto or to the like effect, requiring such registrar to prepare a certificate of such judgment and to forward the same as hereinafter provided.

Certificate of
judgment.
Ibid.
Fifth Schedule.

18. (1) Thereupon such registrar shall prepare a certificate of such judgment in the form in the Fifth Schedule hereto or to the like effect, addressed to the clerk of such local court of a State in which this Act has been proclaimed to be in force as such person may require, and stating—

- (a) that such judgment was obtained in such district court in respect of a cause of action which arose within the jurisdiction for a debt or liquidated demand in money not exceeding the sum of two hundred pounds ;
- (b) the nature of the cause of action ;
- (c) the amount recovered ;
- (d) that the same is in full force and remains unsatisfied (or if partly satisfied the amount or balance remaining due and unsatisfied).

To be forwarded
to local court.
Ibid.

(2) Such certificate shall be signed by the registrar of such district court and authenticated by the seal of such court, and shall be forwarded by such registrar through the post by registered letter addressed to the clerk of such local court.

Entry of
satisfaction.
Ibid. s. 7.
Sixth
Schedule.

19. The registrar of any district court in which a judgment has been obtained, and of which judgment a certificate as aforesaid has been given, shall (upon receipt of a certificate in the form in the Sixth Schedule hereto or to the like effect under the hand of the clerk of any local court of a State in which this Act has been proclaimed to be in force, and authenticated by the seal of such court, stating that such judgment has been satisfied either wholly or in part) enter up satisfaction in the register of such district court to the amount mentioned in such last-mentioned certificate.

PART V.

S. 20.

ENFORCEMENT OF INTERSTATE JUDGMENTS OF LOCAL COURTS.

20. The registrar of any district court, upon receipt through the post of a registered letter containing a certificate (in the form in the Seventh Schedule hereto or to the like effect addressed to him as such registrar under the hand of the clerk of any such local court, and authenticated by the seal of such court) of a judgment obtained in such local court against any person resident in New South Wales stating--

Judgment of inter-state local court may be entered up in district court. Seventh Schedule. 52 Vic. No. 23, s. 8.

- (a) that such judgment was obtained in such local court in respect of a cause of action which arose within the jurisdiction thereof for a debt or liquidated demand in money not exceeding the sum of two hundred pounds ;
- (b) the nature of the cause of action ;
- (c) the amount recovered ; and
- (d) that the same is in full force and remains unsatisfied (or if partly satisfied, the amount or balance remaining due and unsatisfied),

shall enter up judgment in the register of such district court for the amount appearing in such certificate to be due, in favour of the person named therein as the judgment creditor, and against the person named therein as the judgment debtor.

21. The registrar of such district court shall, on the receipt of such certificate, forthwith send by post a notice, in the form in the Eighth Schedule hereto, or to the like effect, addressed to the defendant at his address specified in such certificate.

Notice to defendant. *Ibid.* Eighth Schedule.

22. Such judgment shall thereupon be deemed to be a judgment of such district court, and shall have the same force and effect as if such judgment had been obtained in such district court, and the like proceedings may be had and taken upon and under the same accordingly.

Judgment to take effect as a district court judgment. *Ibid.*

23. (1) The Supreme Court or a Judge thereof may, on the application of any person against whom judgment has been so entered up, either set aside such judgment or direct a stay of execution or of proceedings on such judgment.

Setting aside judgment or staying execution thereon. *Ibid.*

- (2) (a) The judge of such district court ; or
- (b) a stipendiary or police magistrate acting for the district within which such person resides ; or
- (c) if there is no such magistrate a justice of the peace for New South Wales,

may, on the application of such person, direct a stay of execution, or of proceedings, on such judgment.

(3) On the hearing of any such application, such Court, judge, magistrate, or justice may enter upon the merits of the whole case, but the judgment so entered up shall be regarded as *prima facie* proof of the plaintiff's case.

(4) The setting aside such judgment, or stay of execution, or of proceedings may be upon such terms as to giving security or payment of costs, or as to making application to the

Inter-State Debts Recovery Act.

S. 23. local court in which the judgment was originally obtained to set aside the same, or otherwise, as to the said court, judge, magistrate, or justice may seem fit.

Certificate of satisfaction.

24. On the satisfaction, either wholly or in part, of any judgment entered up in the register of any district court under this Act, the registrar of such district court shall forthwith give notice, in the form in the Ninth Schedule hereto, or to the like effect, of such satisfaction, or part satisfaction (as the case may be) to the clerk of the local court in which such judgment was originally obtained, and from whom he received the certificate thereof.

Ninth Schedule.
52 Vic. No. 23,
s. 9.

Moneys recovered under judgment to be remitted to local court.
Ibid.

25. All moneys received or paid into court in satisfaction of such judgment shall, after the cost of remitting the same has been deducted therefrom, be remitted to the clerk of such local court.

SCHEDULES.

FIRST SCHEDULE.

Reference to Act.	Title or short title.	Extent of repeal.
19 Vic. No. 12 ..	An Act to give further remedies to creditors against persons removing from one Australian Colony to another.	The whole.
52 Vic. No. 23 ..	Intercolonial Debts Act, 1889	The whole.

Sec. 18.

SECOND SCHEDULE.

STATE OF NEW SOUTH WALES.

In the District Court at _____ No. of plaintiff
Between A.B., of [address and description], plaintiff,
and
C.D., of [address and description], defendant.

I, A.B., of [address and description], make oath and say as follows:—

I am informed and verily believe that the said C.D. is resident out of the jurisdiction, at _____

I have a good cause of action which arose within the jurisdiction against the said C.D. for the sum of _____ for [here state shortly the amount sought to be recovered and nature of the suit or cause of action; if the amount originally due has been reduced by payment or admitted set-off or by abandonment of excess the same must be stated and particulars given].

I am informed and verily believe that the said C.D. now resides at _____ and that the same is distant about _____ miles from this Court.

(Signed) _____ A.B.

Sworn at _____ in the State of New South Wales this _____ day of _____ one thousand nine hundred and _____ before me, G.H., a District Court Judge, &c., in the State of New South Wales [or a Commissioner for taking affidavits in the Supreme Court of New South Wales, or Justice of the Peace of the State of New South Wales, or a Registrar or Deputy-Registrar of the District Court at _____ in the State of New South Wales].

THIRD SCHEDULE.

Sec. 3.

STATE OF NEW SOUTH WALES.

In the District Court at

No. of plaint

Sec. 16.

Between A.B., plaintiff,
and
C.D., defendant.

I, A.B., of [address and description] make oath and say as follows:—

On the day of one thousand nine hundred and
judgment in the District Court at in a certain cause [No. of plaint]
wherein I am plaintiff and C.D. is defendant was recovered by me in respect of a cause
of action which arose within the State of New South Wales for a debt [or liquidated
demand in money] not exceeding the sum of two hundred pounds, to wit the sum of
including costs of suit against the said C.D.

Such judgment was obtained in an action for [here state cause of action and give
particulars; also if the amount originally due was reduced before action by payment,
admitted set-off, or abandonment of excess, so state and give particulars].

The time for appealing against such judgment has expired, and no appeal is
pending.

Such judgment is still in force and unsatisfied [or such judgment has been
satisfied in part by the payment of the sum of but is still in force and
remains unsatisfied to the extent of the sum of].

I am informed and verily believe that the said C.D. is resident out of the juris-
diction at [address].

Sworn at in the State of New South Wales this day of
one thousand nine hundred and before me, G.H., a District Court Judge,
&c., in the State of New South Wales [or Commissioner for taking affidavits in the
Supreme Court of New South Wales, or Justice of the Peace of the State of New South
Wales, or a Registrar or Deputy-Registrar of the District Court at
in the State of New South Wales].

FOURTH SCHEDULE.

Sec. 17:

STATE OF NEW SOUTH WALES.

In the District Court at

No. of plaint

Between A.B., plaintiff
and
C.D., defendant.

I, A.B., of [address and description] the abovenamed plaintiff do hereby
require you to give a certificate of judgment in the above action and to forward the
same to the clerk of the Court of [or at] in the State [or Colony] of

[Signed] A.B.

To the Registrar of the District Court at

FIFTH SCHEDULE.

Sec. 18.

STATE OF NEW SOUTH WALES.

Certificate of Judgment.

In the District Court at

No. of plaint
(Seal)

Between A.B., plaintiff,
and
C.D., defendant.

I, W.J., the Registrar of the District Court at in the State of New
South Wales and the person having the lawful custody of all records, books, process,
and other proceedings, and of the seal of the said Court, do hereby certify that A.B. of
[address and description] did in the said District Court at on the day of
one thousand nine hundred and recover judgment against the said
C.D. now of out of the jurisdiction in respect of a cause of action which
arose within the State of New South Wales for a debt or liquidated demand in money
not exceeding the sum of two hundred pounds, to wit the sum of including costs
of suit, that such judgment was obtained in an action for [here state cause of action and
give particulars; also if the amount originally due was reduced before action by pay-
ment, admitted set-off, or abandonment of excess, so state and give particulars], and that

Inter-State Debts Recovery Act.

Sch. 8. the time for appealing against such judgment has expired and that no appeal is pending, and that such judgment is still unsatisfied and in full force [or that such judgment has been satisfied in part by the payment of the sum of but is still in force and unsatisfied to the extent of the sum of].

Given under my hand and the seal of the District Court at this
day of 19 .

W.J.,

(L.S.) Registrar of the said District Court at
To the Clerk of the Court of [or at]
in the State [or Colony] of

Sec. 19.

SIXTH SCHEDULE.

I, E.F., the Clerk of the Court of [or at] in the State [or Colony] of and the person having the lawful custody of all records, books, process, and other proceedings, and of the seal of the said Court, do hereby certify that the judgment mentioned in the certificate of judgment dated the day of one thousand nine hundred and given under the hand of W.J., the Registrar of the District Court at in the State of New South Wales, and the seal of the said Court in a certain action in the said District Court at in the said State of New South Wales, wherein A.B. is plaintiff and C.D. is defendant, has been wholly paid and satisfied [or has been satisfied to the extent of the sum of].

Given under my hand and the seal of the Court of [or at] in the
State [or Colony] of this day of 19 .

(L.S.)

E.F.,

Clerk of the said Court of [or at]

To the Registrar of the District Court at
in the State of New South Wales.

Sec. 20.

SEVENTH SCHEDULE.

Certificate of Judgment.

In the Court of [or at] No. of plaintiff
Between A.B., plaintiff, (Seal)
and

C.D., defendant.

I, E.F., the Clerk of the Court of [or at] in the State [or Colony] of and the person having the lawful custody of all records, books, process, and other proceedings, and of the seal of the said Court, do hereby certify that A.B., of [address and description] did in the said Court of [or at] on the day of one thousand nine hundred and recover judgment against the said C.D., of in the State of New South Wales in respect of a cause of action which arose within the State [or Colony] of for a debt or liquidated demand in money not exceeding the sum of two hundred pounds, to wit the sum of including costs of suit, that such judgment was obtained in an action for [cause of action to be stated and particulars given; also if amount originally due was reduced before action by payment, admitted set-off, or abandonment of excess, the same should be stated and particulars given], and that the time for appealing against such judgment has expired and that no appeal is pending, and that such judgment is still unsatisfied and in full force [or that such judgment has been satisfied in part by the payment of the sum of but is still in force and unsatisfied to the extent of the sum of].

Given under my hand and the seal of the Court of [or at] this
day of 19 . (L.S.) E.F.,

Clerk of the said Court of [or at]

To the Registrar of the District Court at
in the State of New South Wales.

Sec. 21.

EIGHTH SCHEDULE.

In the District Court at (Seal)

To C.D. of [address and description]

I, W.J., the Registrar of the District Court do hereby give you notice that a judgment has been obtained against you by A.B. of [address and description] in

Sch. 8.

respect of a cause of action which arose within the State [or Colony] of
 for a debt or liquidated demand in money not exceeding the sum of two hundred and
 fifty pounds, to wit the sum of including costs of suit in the Court of [or at]
 , that such judgment was obtained in an action for *[here state cause of action
 and give particulars; also if the amount originally due was reduced by payment,
 admitted set-off, or abandonment of excess, so state and give particulars]*, and that the
 time for appealing against such judgment has expired and that no appeal is pending,
 and that such judgment is still unsatisfied and in full force [or that such judgment has
 been satisfied in part by the payment of the sum of but is unsatisfied to the
 extent of the sum of]

Given under my hand and the seal of the District Court at this
 day of 19 .

W.J.,
 Registrar of the said District Court at

NINTH SCHEDULE.

Sec. 24:

In the District Court at

(Seal)

I, W.J., the Registrar of the District Court at in the State of New
 South Wales, and the person having the lawful custody of all records, books, process,
 and other proceedings, and of the seal of the said Court, do hereby certify that the
 judgment mentioned in the certificate of judgment dated the day of
 one thousand nine hundred and under the hand of E.F. the clerk of the
 Court of [or at] in the State [or Colony] of and the seal
 of the said Court in a certain action in the said Court of [or at]
 wherein A.B. is plaintiff and C.D. is defendant, has been wholly paid and satisfied [or
 has been satisfied to the extent of the sum of]

Given under my hand and the seal of the District Court at in the State
 of New South Wales this day of 19 .

(L.S.) W.J.,
 Registrar of the District Court at

To the Clerk of the Court of [or at]
 in the State [or Colony] of

B. 1.

JURY ACT 1901.

TABLE

Showing how the sections of Acts consolidated have been dealt with.

Section of Repealed Acts.	Section of Consolidated Act.	Remarks.
5 Vic. No. 4, s. 1, 2		Dealt with in Supreme Court and Circuit Courts Act.
3		Repealing section.
4-8		Superseded by 11 Vic. No. 20.
9	44	
10		Dealt with in Supreme Court and Circuit Courts Act.
11		Dealt with in Sheriff Act.
11 Vic. No. 20, s. 1	3	
2	5	
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4	8, 9	
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8	13, 14, 16	
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12	34, 37, 38	
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15	46, 47	
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33	78	
34	7, 33	
35	80	
36	81	
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38	83	
39	84	
40	85	
41	86	
		Repealed in part by 55 Vic. No. 5, s. 34.
		Provisions omitted as unnecessary.
		Part repealed by Sheriff Act, 1900.

Section of Repealed Acts.	Section of Consolidated Act.	Remarks.
42	88	Juror's fund abolished, 15 Vic. No. 16, s. 1.
43	.....	Obsolete; refers exclusively to Port Phillip
44	.....	Commencement and repeal.
45	.....	Spent.
15 Vic. No. 3, s. 1	75	Superseded as to rates of compensation by 40 Vic. No. 6, s. 4.
2	76	
3	.....	Repealed, 51 Vic. No. 10, s. 1.
4	34-36	
5	58	
6	45, 50	
7	5	
8	.....	Repealed, 55 Vic. No. 5, s. 34.
9-11	.....	Repealed, Common Law Procedure Act, 1899.
15 Vic. No. 16, s. 1, 2	77	See Audit Act, 1898, s. 5.
18 Vic. No. 18, s. 1	38	
2	.....	Repealed, 40 Vic. No. 6, s. 6.
3	51	
4	79	As to refund of fees: see 51 Vic. No. 10, s. 1.
5	87	
6	10, 13, 15, 16	
7	10, 12	
20 Vic. No. 31, s. 25	43	
22 Vic. No. 18, s. 51	3, 8, 9, 16, 20	
52	23, 24, 27	
53	26, 27	
57	74	
22 Vic. No. 35, s. 5	.....	Omitted; now unnecessary.
31 Vic. No. 5, ss. 37, 38	5	
37 Vic. No. 8, s. 1	49	
2	.....	Short title.
40 Vic. No. 6, s. 1	9	
2	45, 48	
3	21	
4	72	
5	6	
6	.....	Repealing section.
7	66	
8	8	
9	47	
10	4	
11	87	
12	.....	Commencement and short title.
46 Vic. No. 17, s. 336	57	
337	40	
338	41	
340	66, 67	
51 Vic. No. 10, s. 1	.....	Repealing section.
55 Vic. No. 5, s. 34	.....	Repealing section.

S. 1.

Act No. LXVII, 1901.

An Act to consolidate the statutes relating to Jurors.
[Assented to, 27th December, 1901].

BE it enacted by the King's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and Legislative Assembly of New South Wales in Parliament assembled, and by the authority of the same, as follows :—

PART I.**PRELIMINARY.**

Short title and
division:

1. This Act may be cited as the "Jury Act, 1901," and is divided into parts, as follows :—

PART I.—PRELIMINARY—ss. 1, 2.

PART II.—QUALIFICATIONS, DISQUALIFICATIONS, AND EXEMPTIONS—ss. 3-7.

PART III.—JURORS' DISTRICTS—ss. 8, 9.

PART IV.—JURY LISTS—ss. 10-17.

PART V.—JURORS' BOOKS AND SPECIAL JURORS' LISTS—ss. 18-22.

PART VI.—LISTS FOR NEW COURTS—ss. 23-27.

PART VII.—TRIAL BY JURY—ss. 28-33.

PART VIII.—JURY PRECEPTS AND SUMMONSES—ss. 34-53.

PART IX.—CHALLENGE—ss. 54-58.

PART X.—STRIKING AND IMPANELLING—ss. 59-65.

PART XI.—REFRESHMENT—s. 66.

PART XII.—DISAGREEMENT—ss. 67, 68.

PART XIII.—VIEW BY JURORS—ss. 69-71.

PART XIV.—FEES—ss. 72-79.

PART XV.—FINES, PENALTIES, &c.—ss. 80-88.

Repeal.
First Schedule.
Saving clause.

2. (1) The Acts mentioned in the First Schedule to this Act are to the extent therein expressed hereby repealed.

(2) All proclamations, rules, orders, notices, summonses, precepts, lists, and jurors' books made or issued under the authority of any enactment hereby repealed, and being in force at the time of the passing of this Act, shall be deemed to have been made or issued hereunder.

PART II.**QUALIFICATIONS, DISQUALIFICATIONS, AND EXEMPTIONS.**

Qualification of
jurors.

11 Vic. No. 20.
s. 1.

22 Vic. No. 18,
s. 51.

3. Except as hereinafter provided every man above the age of twenty-one years, residing in New South Wales, who has within New South Wales in his own name or in trust for him—

(a) a clear yearly income of at least thirty pounds by the year arising out of lands, houses, or other real estate ; or partly out of real and partly out of personal estate ; or

- (b) a clear real or personal estate of the value of at least three hundred pounds, §. 3.

shall be qualified and liable to serve on juries for the trial of all issues, civil and criminal, and for the assessment of damages in all actions at law, and to act as a juror in any District Court.

4. No man—

- (a) who is not a natural born subject of the King, unless he has obtained letters of denization, or been naturalised, or has resided in New South Wales for at least seven years ; Disqualifica-
tion.
11 Vic. No. 20,
s. 3.
40 Vic. No. 6,
s. 10.
or
(b) who has been attainted of any treason or felony, or convicted of any crime that is infamous, unless he has obtained a pardon thereof, or is within the benefit and protection of some Act giving the force and effect of a pardon under the Great Seal for such crime ; or
(c) who has been twice convicted in any part of the British dominions of any treason, felony, or infamous crime,

shall be qualified to serve on any jury under this Act.

For a very full dissertation on the history of the law of England respecting mixed juries in cases of foreigners, and for a review of the origin and progress of trial by jury in this State, see *Reg. v. Valentine*, (1871) 10 S.C.R. 113, where it was held that an alien charged with a criminal offence is not entitled in this State to a jury *de medietate lingue*.

5. (1) The following persons shall be absolutely freed and exempted from being returned and from serving upon any juries whatsoever, and their names shall not be inserted in the lists to be prepared by virtue of this Act, that is to say— Exemptions.
11 Vic. No. 20,
s. 2.
15 Vic. No. 3,
s. 7.
31 Vic. No. 6,
s. 37.

- (a) Judges of the Supreme Court and District Courts, Chairmen of Courts of Quarter Sessions, and the ministerial officers of such Courts ;
(b) members of the Executive and Legislative Councils and of the Legislative Assembly, and the ministerial officers thereof ;
(c) persons holding offices under the departments of the Customs and Distilleries, and of the Colonial Secretary, Surveyor-General, Treasury, Audit Office, and Post Office ;
(d) the mayor, town clerk, and principal surveyor of the city of Sydney ;
(e) clergymen in holy orders, priests of the Roman Catholic faith, and other ministers of religion having established congregations ;
(f) barristers and solicitors duly admitted to practise, and actually practising, and their clerks ;
(g) coroners ;
(h) stipendiary magistrates ;
(i) gaolers, Sheriff's officers, constables, and peace officers ;
(j) physicians, surgeons, apothecaries, and druggists in actual practice ;
(k) military and naval officers on full pay ;

S. 5.

- (l) officers, non-commissioned officers, and volunteers of the volunteer force, after having served as efficient volunteers for at least two years, and officers and non-commissioned officers of the permanent staff of the volunteer force, so long as they continue to serve as efficient volunteers ;
- (m) licensed pilots and masters of vessels actually employed in trading ;
- (n) household officers and servants of the Governor ;
- (o) schoolmasters and parish clerks ;
- (p) such other persons holding office or being in the public service as the Governor exempts from service on juries either generally or for a limited period, of which exemption notice shall be given to the Sheriff ;
- (q) managing directors, managers, cashiers, and tellers of banking establishments ;
- (r) persons above the age of sixty years who claim exemption at any Court of Petty Sessions held for correcting the jury list as hereinafter provided ; and
- (s) persons incapacitated by disease or infirmity from discharging the duty of jurymen.

Evidence as to
volunteers:31 Vic. No. 5,
s. 37.

(2) A certificate under the hand of the officer commanding the volunteer force shall be sufficient evidence of the identity and right of any officer or non-commissioned officer of such force claiming such exemption.

Penalty for
false certificate:
Ibid. s. 38.

(3) If any such commanding officer knowingly gives a false certificate under this section he shall for every such offence be liable to a penalty not exceeding two hundred pounds to be recovered by action of debt or information in the Supreme Court, and paid into the Consolidated Revenue :

Provided that such proceeding shall not protect such commanding officer from a criminal proceeding for misdemeanour.

Ministerial officers of both the Supreme and District Courts have been considered to be alike exempt.—(*Commissioner's Note.*)

Exemption to
be claimed:40 Vic. No. 6,
s. 5.

6. No person otherwise entitled to exemption from service as a juror shall be exempted unless he has claimed such exemption by notice to the Sheriff thirty days at the least before he is summoned.

Qualification of
jurors upon
inquests under
writs of inquiry
and commis-
sions:11 Vic. No. 20,
s. 34.

7. (1) No person who is not duly qualified according to this Act to serve as a juror shall be liable to be summoned or impanelled to serve as a juror upon any inquest or inquiry by or before any sheriff or coroner by virtue of any writ of inquiry, or by or before any commissioner appointed under the Great Seal or the Seal of the Supreme Court.

(2) Provided always that nothing in this section contained shall extend to any inquest before any coroner by virtue of his office.

PART III.

S. 8.

JURORS' DISTRICTS.

8. The Sydney police district and all places within a distance of twelve miles from the Sydney Town Hall shall be the jurors' district for Sydney in respect of all courts held within that city by or before the Supreme Court or any Judge thereof, and all Courts of Quarter Sessions and District Courts held therein.

Sydney jurors' district.
11 Vic. No. 20, s. 4.
22 Vic. No. 18, s. 61.
40 Vic. No. 6, s. 8.

But see Jury (Amendment) Act, 1902. (*post*).

9. (1) The jurors' district for every other town or place at which any court for the trial by jury of civil and criminal issues and the assessment of damages, or any court of Quarter Sessions or any District Court is appointed to be held shall be the police district for such town or place, or the said police district together with such other police district or districts adjoining thereto as the Inspector-General of Police thinks fit.

Other jurors' districts.
11 Vic. No. 20, s. 4.
22 Vic. No. 18, s. 61.
40 Vic. No. 6, s. 1.

(2) Whenever it is made to appear to the Governor that the list of jurors qualified to serve on any jury for any such town or place does not contain two hundred names, the Governor may extend the jurors' district for such town or place to such extent as he thinks fit.

The original sections became unworkable, and these clauses embody the practice which has prevailed for some thirty years.—(*Commissioner's Note*.)

But see Jury (Amendment) Act, 1902, (*post*).

PART IV.

JURY LISTS.

10. The clerk or, if there be more than one, the senior clerk of petty sessions of the police district in which is situated any town or place where any such court is appointed to be held, shall, within the second week of October in every year, issue a notice in writing to the chief constable of the said police district in the form contained in the Second Schedule to this Act, requiring him to make out during the second, third, and fourth weeks of the month of November then next ensuing a true list of all men within the jurors' district for such town or place liable to serve on juries according to this Act; and shall at the same time furnish him with the form of return set forth in the Third Schedule to this Act.

Notice to chief constables to make out lists.
11 Vic. No. 20, s. 5.
18 Vic. No. 18, ss. 6, 7.
Second Schedule.

Third Schedule.

11. (1) The said chief constable shall forthwith after the receipt of the said notice, prepare and make out in alphabetical order a true list of every man residing within such jurors' district, qualified and liable to serve on juries as aforesaid, with the true christian and surname correctly and legibly written at full length, and with the true residence, degree, calling or business, and nature of the qualification of every such man in the proper columns of the said form of return.

Lists to be prepared by chief constables.
11 Vic. No. 20, s. 6.

(2) The chief constables of other police districts within which portions of such jurors' district may be shall assist such first-mentioned chief constable in preparing and making out such list, by communicating to him the name, residence, addition, and nature of the qualification of every man within such police districts, qualified and liable to serve on juries as aforesaid.

S. 12.

Lists to be open
for inspection.

11 Vic. No. 20,
s. 7.

18 Vic. No. 18,
s. 7.

Fourth
Schedule:

12. The said chief constable having made out such list shall, on the last Saturday in November, affix on the principal door of every court-house and police office in his district, a notice in the form contained in the Fourth Schedule to this Act; and shall keep the original list or a true copy thereof to be inspected by the inhabitants of the said jurors' district at any reasonable time, without fee, to the end that due notice may be given of any names improperly inserted in or omitted from the said list.

Special petty
sessions to be
summoned.

11 Vic. No. 20,
s. 8.

18 Vic. No. 18,
s. 6.

13. The said clerk of petty sessions shall, before the twentieth day of November in every year, cause all the justices resident within the jurors' district to be summoned to attend a special petty sessions, at the usual place of meeting of the petty sessions for the police district in which such town or place as aforesaid is situate, on the second Tuesday in the month of December then next, for the purpose of correcting and allowing the jury list for such jurors' district.

But see Jury (Amendment) Act, 1902, (*post*).

Correction and
allowance of
lists.

11 Vic. No. 20,
s. 8.

14. (1) The said justices shall hold a special petty sessions accordingly, and they or any two of them shall sit *de die in diem* until the said lists are corrected and allowed as hereinafter provided.

(2) The said chief constable shall then and there produce the list of men qualified and liable to serve on juries by him prepared and made out as aforesaid.

(3) The justices attending such sessions shall thereupon examine the said list, and shall strike out therefrom the names of all persons not liable to serve or disqualified from serving upon such juries, and also the names of those who are disabled by lunacy or imbecility of mind, or by deafness, blindness, or other permanent infirmity of body, and also the names of all men of bad fame or immoral character and repute; and shall insert in such list all names improperly omitted, and correct all errors and inaccuracies therein.

(4) If the said justices are divided in opinion upon any question as to the striking out or adding of any name, the decision thereof shall be determined by ballot.

(5) When such list is duly corrected it shall be allowed by the justices present or two of them, who shall sign the original list and three fair copies thereof with their allowance thereof:

Provided that where no Circuit Court or Court of Quarter Sessions is appointed to be held at such town or place, one fair copy only shall be necessary.

In *Rickelson v. Barbour*, (1878) 1 S.C.R. N.S. 193, where a jury list had been improperly revised by a bench of magistrates, of which the plaintiff was one, a new trial was ordered.

Sheriff's
bailiffs to attend
court.

18 Vic. No. 18,
s. 6.

15. The bailiffs of the Sheriff acting in such jurors' district shall attend the petty sessions on notice in that behalf from the clerk of petty sessions, and there afford to the justices all such information touching the names, residences, and business of the persons mentioned in the lists as it is in the power of such bailiffs to afford.

16. (1) If the Supreme Court or a Circuit Court or Court of Quarter Sessions is appointed to be held at such town or place, the clerk of petty sessions shall, on or before the last day of December, transmit one of such fair copies to the Sheriff, and if a District Court is appointed to be held at such town or place, he shall, on or before such date, transmit one of such fair copies to the Judge thereof.

S. 16.
Lists to be transmitted to Sheriff and District Court Judges.
11 Vic. No. 20, s. 8.
18 Vic. No. 18, s. 6.
22 Vic. No. 18, s. 51.

(2) The said clerk shall keep the said original corrected list among the records of his office ; and shall have one of such fair copies ready to be produced in the Supreme Court or Circuit Court, or in any Court of Quarter Sessions when the same is required therein.

17. The Sheriff shall keep the lists so transmitted to him among the records of his office.

Sheriff to record lists:
11 Vic. No. 20, s. 9.

PART V.

JURORS' BOOKS AND SPECIAL JURORS' LISTS.

18. Within ten days from the receipt of such list for any jurors' district, the Sheriff shall make out therefrom a book to be called the "jurors' book" for such district, and shall in the said book transcribe in alphabetical order the names of all persons contained in the said list, beginning under each letter of the alphabet with the surname of each person, together with the addition of the residence, degree, calling or business, and qualification of each person.

Jurors' books to be made out from lists.
Ibid.

19. The said jurors' book shall be kept by the Sheriff among the records of his office, and shall be ready to be produced in Court upon the trial of every issue, and shall be brought into use on and from the first day of January after the allowance of the said list, and shall be used for one year then next following or until a new list has been duly prepared corrected and allowed for another year.

Jurors' books to be in use for one year or until new lists allowed.
Ibid.

20. The Judge of the District Court to whom any such list is transmitted shall in like manner prepare a jurors' book for such Court.

District Court jurors' book.
22 Vic. No. 18, s. 51.

21. (1) Immediately after making out the jurors' book for any district the Sheriff shall make out therefrom a list to be called the "special jurors' list" for such district, and shall in the said list insert in alphabetical order the name of every person described in the said book as a justice of the peace, lessee of the Crown, banker, bank director, merchant, accountant, engineer, manager of a station, broker, chemist, druggist, warehouseman, commission agent, architect, or as the owner or tenant of any lands or tenements of the yearly value of one hundred pounds and upwards, together with the residence and addition of such person, and shall prefix to every name in such list its proper number from the first name down to the last in a regular arithmetical series.

Special jurors' list.
11 Vic. No. 20, s. 10.
40 Vic. No. 6, s. 3.

S. 21.

(2) The Sheriff shall annex such list to the jurors' book from which it has been made out, to be kept and produced therewith.

Copies to be sent to clerks of petty sessions.

11 Vic. No. 20, s. 10.

22. The Sheriff shall forthwith transmit a copy of such list to the clerk of the petty sessions from which he has received the general list from which the same has been extracted, and such special jury list shall be kept by the said clerk of petty sessions ready to be produced in any such court as aforesaid when required therein.

PART VI.
LISTS FOR NEW COURTS.

On proclamation of new court jury lists may be directed to be prepared.

11 Vic. No. 20, s. 11.

22 Vic. No. 18, s. 52.

23. If the Governor by proclamation directs a Circuit Court, or District Court, or Court of Quarter Sessions to be held at any town or place where provision has not theretofore been made for the preparing and settling of the Jury Lists for such town or place, the Governor may direct the bench of magistrates of the district wherein such town or place is situate to cause jury lists for such town or place to be prepared.

Lists to be prepared within three months.

Ibid.

24. (1) The said bench of magistrates shall thereupon, within three months after the receipt of such direction, cause to be prepared lists of all jurors within the jurors' district for such town or place.

(2) The clerks of petty sessions, chief constables, and justices shall do and perform, within the said period of three months, all such acts, matters, and things in and towards preparing, correcting, allowing, and transmitting the jury list for such jurors' district as are required to be ordinarily done under the provisions of Part IV of this Act.

Sheriff to prepare jurors' book and special jurors' list.

11 Vic. No. 20, s. 11.

25. The Sheriff shall, within the said three months, make out from any such list transmitted to him a jurors' book and special jurors' list for such district according to the provisions of Part V of this Act.

District Court Judge to prepare jurors' book.

22 Vic. No. 18, s. 53.

26. The judge of the District Court to whom any such list is transmitted shall, within ten days from the receipt of such list, make out therefrom a jurors' book for such court according to the provisions of Part V of this Act.

Jurors' books and lists to come into force immediately, and to continue in force until new books and lists prepared.

11 Vic. No. 20, s. 11.

22 Vic. No. 18, ss. 52-3.

27. (1) Every such jurors' book and special jurors' list when settled shall come into force, and the persons whose names are therein set down shall be liable to serve as jurors immediately after such book or list has been made out by the Sheriff or the District Court Judge, as the case may be.

(2) Every such book or list shall continue in force until a new jurors' book or special jurors' list has been made out under the provisions of this Act.

(3) If any jurors' book for a District Court prepared under the provisions of this Part of this Act shall take effect between the months of April and October in any year, no new list shall be prepared until the year then next following.

PART VII.

S. 28.

TRIAL BY JURY.

28. (1) All crimes and misdemeanours prosecuted in the Supreme Court, the Circuit Courts, or Courts of Quarter Sessions, shall be tried by a jury consisting of twelve men chosen and returned according to the provisions of this Act.

Trial by jury in criminal cases.
11 Vic. No. 20,
s. 17.

(2) Except as by this Act is otherwise provided, such jury shall be subject, as nearly as may be, to the same rules, regulations, and manner of proceeding as were observed upon criminal trials in the Court of Queen's Bench in England before the seventeenth day of September, one thousand eight hundred and forty-seven.

29. (1) Upon application made to the Supreme Court by the Attorney-General or other prosecutor, or by or on behalf of any defendant, in any criminal cause depending in the said Court or in any Circuit Court (except in cases of treason or felony), the said Court may order a special jury to be summoned for the trial of the issue in such cause.

Criminal special jury.
Ibid. s. 18.

(2) Every such special jury shall be taken from the special jurors' list for the jurors' district within which such cause is to be tried, and shall be summoned, struck, and sworn in like manner as special juries under this Act for the trial of civil issues, and shall be liable to the same fines and forfeitures, and entitled to the same exemptions as are by this Act authorised with respect to such juries.

(3) Provided that any defendant making application for a special jury shall serve upon the Attorney-General or other prosecutor a notice in writing of such application at least four clear days before the time of his making the same.

30. Subject to the provisions of this Act and of any other Act in force for the time being, all actions at law and civil issues of fact in the Supreme Court shall be tried, and all damages and sums of money recoverable in any such action after judgment by default or upon demurrer (other than such damages as are usually assessed or computed by the Court or some officer thereof) shall be assessed, before one or more Judge or Judges of the said Court, whether the trial or assessment is had in the said Court or in any Circuit Court, by a jury consisting of four persons duly qualified according to law as special jurors, and returned and chosen as hereinafter mentioned.

Trial and assessment in civil cases.
Ibid. s. 20.

31. Upon application made to the said Court by either the plaintiff or the defendant in any action, at any time after issue joined, the said Court may order that the trial shall be had by a jury consisting of twelve persons, who shall be returned under the provisions of this Act either from amongst the class of special jurors or of common jurors, or in cases to be tried on circuit partly from each class, as the Court thinks fit to order.

Juries of twelve.
Ibid. s. 21.

At any time after issue joined.—See R. 126 (*post*) and note thereto.

In *Allen v. Willis*, (1895) 11 W.N. 192, an application for a common jury of twelve made on the day on which the cause was coming on for trial, was refused, on the ground that it was too late, and made apparently merely for purposes of delay.

S. 31.

Common jury of twelve.—According to the practice of the Court here, either party may claim to have the case tried by a common jury of twelve as a matter of right : *Ritchie v. D'Arcy*, (1900) 17 W.N. 93 ; and *Coulshaw v. McLeod*, (1898) 14 W.N. 189 ; if his application is made in time : *Allen v. Willis*, (*supra*).

Special jury of twelve.—With regard to a special jury of twelve it is different. In an application of that nature it lies on the party making the application to prove that the matter to be inquired into is one of public importance or of great difficulty ; and the granting of the application is entirely in the discretion of the Court. For cases on applications of this nature, see—*Tate v. Goodlet*, (1864) 3 S.C.R. 12 ; *Thompson v. The Commissioner of Railways*, cited in note to *Tate v. Goodlet* ; *Gresham v. The Commissioner of Railways*, *ibid.*, p. 13 ; *Nash v. The Bank of N.S.W.*, *ibid.* ; *McElhone v. Bennett*, (1885) 1 W.N. 115 ; *Taylor v. Young*, (1886) 2 W.N. 108 ; *Jeanneret v. Balmain Steam Ferry Co.*, (1886) 3 W.N. 21 ; *McLaughlin v. Bennett*, (1889) 6 W.N. 15. In this last-mentioned case a common jury having failed to agree after a trial lasting five days, and the Judge reporting that the case was one of difficulty, the Court ordered the re-hearing to take place before a special jury of twelve : *ibid.*, 112.

Trial by jury in
unprovided
cases to be
governed by
English rules.
11 Vic. No. 20,
s. 22.

32. In every such case of trial or assessment as aforesaid, and in every other case whatsoever of trial by jury under the provisions of this Act, when no other mode of proceeding is by this Act specially provided, the jurors and jury and every assessment or trial by them shall, as far as may be practicable, be subject to the same rules and manner of proceeding as would in England have been observed in an action at law in the Courts of Westminster or on a trial at nisi prius, before the seventeenth day of September, one thousand eight hundred and forty-seven.

Coroners'
inquests.
Ibid. s. 34.

33. (1) Every coroner when acting otherwise than under a writ of inquiry may take and make all inquests and inquiries by jurors of the same description as coroners were used and accustomed to do before the said date.

(2) Provided that in thinly populated districts any coroner may at his discretion swear a jury of any number not less than five, and the verdict of such jury shall be as valid and effectual in law as if the accustomed number were impanelled and sworn.

Thinly populated districts.—See *In re Loftus*, (1862) 1 S.C.R. 1.

PART VIII.

JURY PRECEPTS AND SUMMONSES.

General jury
precepts.
Ibid. s. 12.
15 Vic. No. 3,
s. 4.
Fifth Schedule.

34. (1) From time to time, and as often as occasion demands, precepts according to the form contained in the Fifth Schedule to this Act, to be called "general jury precepts," shall be issued, directed to the Sheriff, requiring him to summon jurors for the trial of issues and assessment of damages in the Supreme and Circuit Courts and the Courts of Quarter Sessions.

(2) Every such precept returnable in the Supreme Court or any Circuit Court shall be under the hand and seal of a Judge of the Supreme Court.

(3) Every such precept returnable in a Court of Quarter Sessions shall be under the hand and seal of a chairman of a Court of Quarter Sessions or a Justice of the Peace.

35. Whenever a jury of twelve or of four special jurors is required in the Supreme Court or in any Circuit Court for the trial of any issues, a Judge of the Supreme Court shall issue a precept under his hand and seal, according to the form contained in the Fifth Schedule to this Act, to be called a "special jury precept."

S. 35.

Special jury precepts.
11 Vic. No. 20, s. 13.
15 Vic. No. 3, s. 4.
Fifth Schedule.

36. Whenever a jury of twelve common jurors is so required a Judge of the Supreme Court shall issue a precept under his hand and seal according to the said form, to be called a "common jury precept."

Common jury precepts.
Ibid.

37. Every jury precept shall specify the time when and the place where the attendance of the jurors is required, and shall be issued and delivered to the sheriff eight clear days before the time so specified, if such attendance is required in the city of Sydney, and in all other cases fourteen clear days before such time.

11 Vic. No. 20, ss. 12, 13.

38. (1) In every such precept returnable in the Supreme Court or any Circuit Court, the Judge issuing the same may if he think fit require the Sheriff to summon any number of jurors, not being more than four times the number to be impanelled upon any one trial.

Number of jurors to be summoned.
Ibid. s. 12.
18 Vic. No. 18, s. 1.

(2) No such precept returnable in a Court of Quarter Sessions shall require the Sheriff to summon at any one time more than forty-eight or less than thirty-six jurors.

39. The Sheriff shall give priority to every jury precept whether returnable in the Supreme Court, or a Circuit Court, or a Court of Quarter Sessions, according to the time of its receipt at his office.

Priority of precepts.
11 Vic. No. 20, s. 14.

40. (1) Every Court sitting for the trial of prisoners may, on motion for that purpose made on behalf of either the Crown or any prisoner, order the Sheriff to summon and return to the Court—

Enlarged or separate jury panel may be ordered by the Court.
46 Vic. No. 17, s. 337.

(a) an enlarged jury panel, not exceeding twenty-four jurors, in addition to those already summoned ; or

(b) a separate jury panel, of not less than thirty or more than sixty jurors,

to be taken from either the general or the special jury list, as the Court thinks it for the interests of justice to order.

(2) Every person liable to serve as a juror, and residing within twenty miles of the place of trial, being summoned under any such order and having no lawful excuse, shall be bound to attend, and liable to be proceeded against for non-attendance as if he had been summoned under a precept in the ordinary course.

41. At any time before the trial of a person committed or held to bail, every Judge of the Supreme Court on application to him in chambers on behalf of such person or of the Crown (of which last-mentioned application such person has had due notice) shall have the same power as in the next preceding section is

The like order by a Judge before trial.
Ibid. s. 338.

- S. 41.** mentioned in respect of the intended trial of such person, whether in such Court or in a Circuit Court or in a Court of Quarter Sessions.

Power reserved to courts of issuing precepts and making orders, &c., as heretofore.

11 Vic. No. 20, s. 19.

42. (1) The Supreme Court and Circuit Courts and all Courts of Oyer and Terminer and Gaol Delivery and Courts of Quarter Sessions shall respectively have and exercise the same power and authority as they have heretofore had or exercised in issuing any writ or precept, or in making any award or order orally or otherwise for the return of a jury for the trial of any issue before any of such Courts respectively, or for the amending or enlarging any panel of jurors returned for the trial of any such issue.

(2) The return to every such writ, precept, award or order shall be made in the manner used and accustomed in such courts respectively in England before the seventeenth day of September, one thousand eight hundred and forty-seven, save and except that the jurors shall be qualified according to this Act.

Special rule or order for summoning jury.

20 Vic. No. 31, s. 25.

43. The Supreme Court or any Judge thereof may make all such rules or orders upon the Sheriff or other person as may be necessary to procure the attendance of a special or common jury for the trial of any cause or matter depending in such Court at such time and place and in such manner as the Court or Judge thinks fit.

Provision for cases where the Sheriff is interested.

5 Vic. No. 4, s. 9.

44. (1) In every case wherein it is made to appear to the Supreme Court or to a Judge thereof that the Sheriff is a party or in any manner interested, the venire or precept to be issued therein shall be directed and delivered to the coroner or such other person as the said Court or Judge shall in that behalf appoint.

(2) Such coroner or person shall thenceforward have and exercise for the purposes of such writ or precept all the powers and duties of the Sheriff.

Jurors to be chosen by lots:

11 Vic. No. 20, s. 14.

15 Vic. No. 3, s. 6.

40 Vic. No. 6, s. 2.

45. (1) When a jury precept is delivered to the Sheriff, he shall choose in manner following the persons to be summoned from those whose names appear in the appropriate jurors' book or special jurors' list for the district within which the attendance of jurors is by the said precept required :—

- (a) Cards printed or stamped only with the same numbers as are prefixed in the said book or list to the names of persons liable to be summoned shall be placed in a rotating ballot-box approved of by the Minister of Justice.
- (b) Such box first having been made to rotate for one minute at least by the Sheriff or his deputy, as many cards shall be drawn forth one at a time as there are jurors required to be summoned.
- (c) Where the number on any such card indicates the name of a juror whom the Sheriff or his deputy knows to be dead or to have left the district, another card shall be drawn in its place ; and a special return shall be made to the Court, with the names of the jurors summoned, of the names of all jurors so omitted, with the cause thereof.

- (d) The persons whose names in the said book or list correspond with the numbers on the cards so drawn shall be the jurors to be summoned.

8. 45.

(2) If through any casualty there is no jurors' book for such district in existence for the current year, the Sheriff shall choose the jurors as aforesaid from the jurors' book for the year preceding.

46. The Sheriff shall forthwith issue to each such juror a summons in writing signed by himself or his deputy in the form contained in the Sixth Schedule to this Act.

Summons to jurors.
11 Vic. No. 20,
s. 15.
Sixth Schedule.

47. (1) Such summons shall be—

Service of summons.

- (a) delivered to such juror or left at his usual place of abode at least four clear days before the time specified for his attendance, if his attendance is required in Sydney, and in other cases at least eight clear days before such time ; or
- (b) sent to him by post with the Sheriff's seal of office thereon, in which case two additional days shall be allowed between the day of service and the time specified for his attendance.

Ibid.
40 Vic. No. 6,
s. 9.

(2) A duplicate of every summons so sent by post shall be stamped by the postmaster, or some person duly acting for him, at the time of delivery at the office for transmission ; and such duplicate shall be evidence that the juror named was served in the ordinary course of post.

48. No juror so chosen and summoned as aforesaid shall be again liable to be summoned until every person on such jurors' book or special jurors' list has been summoned.

Juror not liable to be again summoned till list exhausted.
Ibid., s. 2.

49. Whenever the Sheriff is required by any jury precept to summon jurors for the trial of issues in the Supreme Court or Court of Quarter Sessions at Darlinghurst on any particular day or days, and is also required by any other jury precept to summon jurors for the trial of issues on the same day or days in the Supreme Court in King-street, he shall not summon for either court the same jurors whom he has already summoned to attend at the other court, but he shall omit from any summons for either court the names of all such jurors as he has already summoned for the other, conforming in other respects in the matter of such summons to the directions of this Act.

Same jurors not to be summoned at the same time to attend at courts at Darlinghurst and King-street.
37 Vic. No. 8,
s. 1.

50. The Sheriff in civil cases may omit the summoning of persons whom he knows to be incapacitated by disease from attending as jurors :

Jurors incapacitated by disease:
13 Vic. No. 3,
s. 6.

Provided that he shall specially return to the Court the names of all such persons with the ground on which he has omitted to summon them.

51. The Sheriff on showing to the satisfaction of a Judge of the Supreme Court that the name or description of any juror has been mistaken may, by the leave of such Judge in writing, cause

Mistakes in names may be corrected.
18 Vic. No. 18,
s. 3.

- S. 51.** the mistake to be corrected and the party to be thereafter summoned by his right name and description :

Provided that in every such case there be no question as to the identity in fact of the juror.

Sheriff's return
to general
precept.
11 Vic. No. 20,
s. 16.

52. Upon the day and at the place named in any jury precept for the appearance of the jurors thereby required to be summoned, the Sheriff shall by himself or his deputy return the said jury precept into the court holden at the place where such jurors are so required to attend, and shall annex to the said precept a panel containing the names in alphabetical order of the persons so summoned by him in pursuance of the said jury precept, and shall also therewith furnish to the clerk of the said Court the names of the said persons with their respective additions and places of abode written upon separate pieces of card, each piece of card being as nearly as may be of equal size.

Informalities
&c., not to in-
validate verdict:
Ibid.

53. No omission or informality with respect to any lists or precepts or panels returned in pursuance of this Act shall affect or invalidate any verdict returned by a jury which is in other respects according to law.

PART IX.

CHALLENGE.

Right of
challenge:
Ibid. s. 24.

54. Subject to the provisions of this Act, and of any Act for the time being in force, challenge to the array and to the polls of jurors may be made and shall be allowed in every court for such and the like cause, in such and the like form and manner, and under and subject to the like laws, rules, and regulations in every respect, as by law was or were established, used and practised in like cases in the Courts at Westminster before the seventeenth day of September, one thousand eight hundred and forty-seven.

Challenge for
cause.
Ibid.

55. In all inquests to be taken before any court wherein the King is a party, notwithstanding it be alleged by them that sue for the King that the jurors of those inquests or some of them be not indifferent for the King, yet such inquests shall not remain untaken for that cause, but if they that sue for the King will challenge any of those jurors they shall assign of their challenge a cause certain, and the truth of the same challenge shall be inquired of according to the custom of the court, and it shall be proceeded to the taking of the same inquisitions as it shall be found if the challenges be true or not, after the discretion of the court.

Standing
jurors by.
Ibid.

56. Nothing herein contained shall affect the power of any court to order any juror to stand by until the panel shall be gone through at the prayer of those prosecuting for the Crown as has been heretofore accustomed.

See *R. v. Jury*, (1888) 9 N.S.W.R. 486 ; 5 W.N. 37.

Challenge in
criminal cases.
46 Vic. No. 17,
s. 336.

57. (1) The same right of challenge to jurors shall exist in cases of misdemeanour as in cases of felony.

(2) No person shall, except for cause shown, be allowed in either case more than eight, or if the offence charged be capital, twenty challenges. **S. 57.**

(3) The Crown shall in every case have the same, but no greater right.

(4) Every peremptory challenge beyond the number so allowed shall be void, and the trial shall proceed as if no such challenge had been made.

See *R. v. Jury*, (1888) 9 N.S.W.R. 486; 5 W.N. 37.

58. (1) No omission error or irregularity by the Sheriff or any of his officers in the time or mode of service of any jury summons, or in the summoning or return of any juror by a wrong name (where there is no question as to his identity) shall be cause of challenge either to the array or to such juror. Informalities in summoning jurors. 15 Vic. No. 3, s. 5.

(2) No matter which might have been objected by way of challenge to the polls or to the array, as the case may be, shall invalidate or affect any verdict in any case, civil or criminal, unless the objection is taken by way of challenge. Objections must be taken by challenge. Ibid.

PART X.

STRIKING AND IMPANELLING.

59. (1) Upon calling on for trial by a jury of twelve persons any criminal issue joined in the Supreme Court or a Circuit Court, or a Court of Quarter Sessions, the clerk of the Court shall, in open Court, put into a box provided for that purpose the pieces of card furnished as aforesaid by the Sheriff, and shall draw out therefrom the said pieces of card, one after another, until twelve men appear without just cause of challenge, which said men being duly sworn shall be the jury to try such issue. Impanelling jury in criminal trials. 11 Vic. No. 20, s. 23.

(2) If the whole number of such pieces of card is exhausted, by challenge or otherwise, before twelve men are duly sworn, either the Crown or the prisoner may pray a *tales*, whereupon the Court or Judge or chairman, as the case may be, may command the Sheriff or his deputy forthwith to appoint as many good and lawful men of the bystanders (being qualified and liable to serve as jurors for the district) as may be sufficient to make up twelve men for the trial of the said issue. Tales allowed: Ibid.

(3) The pieces of card containing the names of the jurors so drawn and sworn as aforesaid shall be kept apart by themselves until such jury have given in their verdict and the same has been recorded, or until such jury is, by consent of the parties or by leave of the court, discharged; and then the said pieces of card shall be returned to the box, there to be kept with the other names remaining undrawn.

60. Where no objection is made on behalf of the King or any other party, the Court may—

(a) try any such criminal issue with the jury that have previously tried or been drawn to try any other such issue, without their names being returned to the box and redrawn; or Different issues may be tried by the same jury. Ibid.

s. 60.

- (b) order the name of any man on any such jury whom both parties consent to withdraw, or who is justly challenged or excused by the court, to be set aside and another name to be drawn from the box, and try such issue with the residue of such original jury and with such man whose name is so drawn, and who appears and is approved as indifferent.

Striking jury

in civil cases.

11 Vic. No. 20,
s. 25.

61. (1) At the opening of the Court upon any sitting for the trial of any civil issue under the provisions of this Act, the clerk or other ministerial officer of the Court shall put into a box provided for that purpose the pieces of card furnished as aforesaid by the Sheriff.

(2) Upon any such issue being called on to be tried, such clerk or officer shall in open court draw out the said pieces of card, one after another until twice the number of jurors required to be impanelled appear and after all causes of challenge allowed to remain indifferent and approved of, or until the whole number of such pieces of card is exhausted.

Tales.

(3) In case a sufficient number of jurors named on such pieces of card are not in attendance, the full number of jurors so directed to be drawn shall be completed by appointment of the Sheriff or his deputy from amongst the bystanders, being persons returned in the Sheriff's books as jurors either special or common.

Impanelling
jury in civil
cases.

Ibid. s. 26.

62. (1) In civil issues, upon twice the number of jurors required to be impanelled being completed, a list of their names shall be delivered by the Sheriff or his deputy to the plaintiff or his attorney or counsel, by whom one-fourth of the whole number of names contained in such list may be struck therefrom, and the list so reduced shall then be delivered to the defendant or his attorney or counsel, by whom an equal number of names may be also struck therefrom.

(2) The jurors whose names then remain upon such list, or the first four or twelve of such jurors (as the case may require), shall be the jurors for the trial of the issue or issues in question, and shall be sworn and impanelled accordingly.

(3) After every such trial the cards so drawn as aforesaid shall be returned to the box, to be kept with the others remaining undrawn.

Interference with jury panel.—To tamper with the jury panel is as much an interference with justice as to tamper with the jury who actually try the case. In *Parker v. Falkiner*, (1889) 10 N.S.W.R. 7, where the defendant, knowing that a particular jurymen had been summoned to try the case, spoke to him regarding the case, a new trial was granted, and defendant ordered to pay the costs of the former trial, and the application for the new trial.

While one jury are retired considering their verdict, another jury from the same panel may be struck without the cards containing the names of the former jury being returned to the box : *Goodchap v. Nixon*, (1863) 2 S.C.R. 182.

Trying different
issues by the
same jury in
civil cases.

Ibid. s. 27.

63. Where no objection is made on behalf of any plaintiff or defendant—

- (a) any number of different issues may be tried by the same jury that have been previously drawn for or have tried any other issue without having their names returned to the box ; or

- (b) the Court or Judge may order the name of any juror on such jury whom the parties consent to withdraw or who may be challenged or excused to be set aside and another juror to be drawn from the box from the names remaining undrawn, who shall be subject to the same mode of striking as the original jurors, to try the issue or issues with the residue of such original jury.

S. 63.

64. The provisions contained in the three next preceding sections shall be equally in force with respect to cases of assessment of damages.

When damages assessed only.
11 Vic. No. 20,
s. 28.

65. Where—

- (a) the defendant, in a case of assessment of damages, or
(b) either the plaintiff or defendant, in a case where there is an issue for trial,

Reducing list where one party does not appear.
Ibid.

does not appear in person, or by counsel or attorney, the list of jurors may be reduced on his behalf by the clerk or other officer of the Court.

PART XI.

REFRESHMENT.

66. The Court or Judge on any trial may order to be supplied to the jury—

- (a) in a criminal case, whether of felony or misdemeanour, such reasonable refreshment as the Court or Judge thinks fit ;
(b) in any other case, any refreshment not being fermented or spirituous liquor,

Judge may order refreshment for jury.
40 Vic. No. 6,
s. 7.
46 Vic. No. 17,
s. 340.

at any time after the jury have been impanelled and sworn, and notwithstanding that they have retired to consider of their verdict.

PART XII.

DISAGREEMENT.

67. Where the jury upon the trial of any felony or misdemeanour have retired more than twelve hours, if it be found, after examination on oath of one or more of them, that they are not likely to agree, the Court or Judge may discharge them.

On criminal trials.
Ibid.

68. (1) Where the jury upon any civil trial or assessment of damages under this Act have remained six hours or upwards in deliberation, if all of them do not agree as to the verdict to be given or amount of damages to be assessed, the decision of three-fourths in number of them shall be taken and entered as the verdict or assessment of all.

In civil cases:
11 Vic. No. 20;
s. 29.

(2) If after having remained in the whole twelve hours or upwards in deliberation, three-fourths in number of the jurors do not concur in any such verdict or assessment, then such jurors shall be discharged, and the cause may without any new process for

Ibid.

- 8. 68.** that purpose be again set down for trial or assessment (as the case may be) either at the same or any subsequent sittings as the Court or presiding Judge may order.

The plaintiff, after the failure of the jury to agree to a verdict, may set down the case again for trial; and his proper course is to set it down at the next sittings, unless the Judge or the Court otherwise order: *Cohen v. Amos*, (1885) 2 W.N. 17.

Where at a trial the jury had been by consent of both parties discharged, at the suggestion of the presiding Judge, before the twelve hours had expired, but after the expiration of about seven hours, it being stated that no probability existed of a verdict being arrived at; *held*, that the finally successful party was entitled to the costs of the abortive trial: *Dolby v. The Bank of New South Wales*, (1864) 3 S.C.R. 297.

PART XIII.

VIEW BY JURORS.

Order for view:
11 Vic. No. 20,
s. 30.

69. (1) Whenever it appears expedient to any Judge of the Supreme Court in any cause depending in the said Court that some of the jury should have a view of any place in dispute in the cause, such Judge may order such view upon the payment by the party applying for the same of such sum as to the said Judge seems reasonable.

(2) Such sum shall be paid over to such jurors as have such view and attend the trial, and shall be taxed and allowed as other costs in the cause.

But the ordinary practice now is under s. 104 of the C.L.P. Act, *q. v., ante*.

View by two or
more.
Ibid.

70. Two or more jurors, as the Judge shall direct, mutually chosen by the parties, or, in case the parties cannot agree, nominated by the Sheriff shall be shown the place by two persons appointed by the said Judge.

Viewers to be
part of panel on
trial.
Ibid.

71. In every such case the said viewers if in attendance upon the Court shall be the first of the jurors named in the Sheriff's list whether they are in the panel returned for the particular day of trial or not, and shall not be struck therefrom by either party; and such viewers so in attendance, together with so many of the jurors whose names first stand on the reduced list as may be necessary to make up the full number of jurors required, shall form the jury to try the cause.

PART XIV.

FEES.

Compensation
to be fixed by
Governor.
40 Vic. No. 6,
s. 4.

72. The Governor may fix from time to time the rates of compensation to be paid to jurors for attendance in the Supreme and Circuit Courts and Courts of Quarter Sessions.

Jury to be paid
accordingly.
11 Vic. No. 20,
s. 31.

73. (1) Every juror summoned in pursuance of any precept as aforesaid who attends any such Court shall for every day during his attendance upon such court, whether he has actually served upon a jury or not, be entitled to receive compensation for such attendance at the said rates.

(2) Provided that in all cases in which there is a regular steam conveyance, or the passage can be conveniently made wholly or in part by water, the allowance of such portion of the journey as has or might have been performed by water shall be limited to the actual amount of the steerage or cabin passage money payable, according to the station in life of the juror. **S. 73.**

(3) Every talesman serving with such jurors shall be entitled to the same compensation as a juror residing within five miles of the said court.

74. Every person summoned or nominated to act as a juror in any District Court shall for his attendance be entitled to the same compensation and allowance for his travelling expenses as are provided for jurors attending the Supreme Court or any Circuit Court under a general jury precept. District Courts. 22 Vic. No. 18, s. 57.

75. So long as any country juror, unavoidably or bona fide for the purpose only of attendance on the panel, remains in the city or town where the court holds its sittings, he shall be entitled to payment in respect of every day of such detention, whether the court actually then sits or not. Country jurors. 15 Vic. No. 3, s. 1.

76. Where the jury has sat on the same trial in any civil case more than three days, the presiding Judge may direct the prevailing party to pay them severally, or to the Sheriff or his deputy for their use, in respect of the fourth and every subsequent day such additional sum or sums, over and above the amount to which they are entitled in accordance with the said rates, as the said Judge under the circumstances thinks reasonable and proper ; and such sum shall be allowed as costs in the cause. Prolonged sittings. Ibid. s. 2.

Where the plaintiff sues *in forma pauperis*, the presiding Judge at *Nisi Prius* has no jurisdiction to order the payment of the additional fee provided for by this section : *Cuthbert v. Hogg*, (1862) 1 S.C.R. 19.

77. (1) In every action in the Supreme Court the plaintiff on entering the case for trial shall pay to the Prothonotary— Fee to be paid on setting down case for trial.

- (a) in a case of assessment of damages, the sum of one pound ; 11 Vic. No. 20, s. 32.
- (b) in a case of trial by a jury of four, the sum of two pounds ; 15 Vic. No. 16, ss. 1, 2.
- (c) in a case of trial by a common jury of twelve, the sum of three pounds ;
- (d) in a case of trial by a special jury of twelve, the sum of six pounds.

(2) Such sum shall be allowed as costs in the cause.

(3) Provided that when the order for such jury of twelve has been made on the application of the defendant, the said sum of three pounds or six pounds, as the case may be, shall be paid by such defendant on the making of the order to the Prothonotary, or such order shall lapse and not take effect.

78. The party applying for or electing a special jury of twelve for the trial of any civil issue shall pay all expenses occasioned by the trial of the cause by the same, and shall not have any further allowance for the same upon taxation of costs than such party would be entitled to in case the cause had been tried by a Costs of special jury unless Judge certify. 11 Vic. No. 20, s. 33.

- 8. 78.** common jury or a jury of four as hereinbefore directed, unless immediately after the verdict the Judge before whom the cause was tried certifies under his hand that the same was a cause proper to be tried by a jury of twelve special jurors.

General rules as to jury fees.

18 Vic. No. 18, s. 4.

- 79.** The Judges of the Supreme Court may make general rules touching the payment of the fees payable by law for juries.

PART XV.

FINES, PENALTIES, &C.

Liabilities of clerks and constables.

11 Vic. No. 20, s. 35.

- 80.** Every clerk of petty sessions or chief constable who wilfully neglects or refuses to execute any of the duties hereinbefore prescribed and appointed to be by him executed shall for every such neglect or refusal forfeit any sum not exceeding fifty pounds, whereof one moiety shall be paid to the Colonial Treasurer for the purposes of the general revenue, and the other moiety shall with full costs go to any person suing for the same by action of debt in the Supreme Court or in any Court of Petty Sessions to the extent of the jurisdiction of such Court.

Liability of justices.

Ibid. s. 36.

- 81.** (1) Every justice of the peace summoned under this Act to attend at any special petty sessions for correcting and allowing any jury list, who fails or neglects to attend such special petty sessions without any reasonable cause for such non-attendance, shall be liable to a fine not exceeding the sum of ten pounds, which shall be summarily imposed by the Supreme Court upon the motion of the Attorney-General and upon the fact of such non-attendance being duly proved to the satisfaction of the said Court.

(2) The clerk of the bench shall at the said special petty sessions make an entry in writing of the name of every justice of the peace residing in the jurors' district and so summoned as aforesaid, distinguishing those that attended and those that were absent at the correction and allowance of the said list as aforesaid, and shall at the final adjournment of the said special petty sessions transmit a certificate thereof to the Attorney-General verified by declaration.

(3) Such certificate shall be *prima facie* proof of the non-attendance of the justices therein stated to have been absent from the said special petty sessions.

Liability of Sheriff.

Ibid. s. 37.

- 82.** If the Sheriff neglects or refuses to discharge the duties hereinbefore required of him, or otherwise fails well and faithfully to do and perform any of the acts, matters and things hereby required to be by him performed, he shall for every such breach of duty be summarily fined a sum not exceeding fifty pounds, at the discretion of the Court in relation to which such duties, acts, matters, and things were required to be discharged, done, and performed.

Liability of viewers.

Ibid. s. 39.

- 83.** If any juror who has had a view of any place in dispute in any cause according to the provisions hereinbefore contained makes default when the cause in which he was appointed a viewer is called on for trial, the Court or Judge may, unless reasonable cause be shown, impose upon such viewer a fine not exceeding the

amount of ten pounds over and above the fine to which he is liable under the provisions hereinafter contained for non-attendance as a juror. **S. 83.**

84. (1) If upon calling over the names upon any jury panel returned as hereinbefore required, any person whose name appears thereon fails to attend, or after appearance wilfully withdraws himself from the presence of the Court, such Court may summarily impose any fine not exceed twenty pounds upon the person so failing to attend or withdrawing himself, unless good cause for his absence be made to appear on oath to the satisfaction of the said Court. Liability of jurors making default. 11 Vic. No. 20, s. 38.

(2) Provided that any such Court may at any time exempt from attendance either during the session or for any less period any person summoned as a juror, who shows to such Court on oath sufficient grounds for such exemption.

(3) Provided also that no juror summoned for the trial of civil issues shall be compelled to attend any sittings for more than three consecutive days unless the presiding Judge shall otherwise order.

85. (1) If any person being duly summoned and returned to serve as a juror upon any inquest or inquiry before any Sheriff or coroner, or before any of the commissioners hereinbefore mentioned, does not, after being openly called three times, appear and serve as a juror, such sheriff or in his absence the under sheriff or such coroner or commissioner (unless some reasonable excuse is proved, on oath if required) shall impose upon the person so making default such fine not exceeding five pounds as he thinks fit. Liability of coroner's jurors, &c. Ibid. s. 40.

(2) Such sheriff, under sheriff, coroner, or commissioner shall make out and sign a certificate containing the christian name and surname, the residence, and trade or calling of every person so making default, together with the amount of the fine imposed and the cause of such fine, and shall transmit such certificate to the clerk of the peace for the county or district in which such defaulter resides on or before the first day of the Quarter Sessions next ensuing.

(3) Such clerk of the peace shall copy the fines so certified on the roll on which all fines or forfeiture imposed at such Quarter Sessions are copied, and the same shall be estreated levied and applied in like manner, and subject to the like powers, provisions, and penalties in all respects, as if they had been part of the fines imposed at such Quarter Sessions.

86. Any person who corruptly influences or attempts to influence any juror, and every juror consenting thereto, shall be guilty of a misdemeanour. Punishment for embracery. Ibid. s. 41.

87. (1) Whenever any fine is imposed on any juror for non-attendance at any court, a summons may forthwith, or at any time afterwards, be issued under the hand of the presiding Judge, calling on the juror to show cause to such court, or to the Supreme Court, if the fine has been imposed for non-attendance at a Circuit Court, on some day to be named, why execution should not issue for such fine. Recovery of fines for non-attendance. 18 Vic. No. 8, s. 6. 40 Vic. No. 6, s. 11.

S. 87.

(2) The like proceedings as far as may be shall be taken in every such case as may be now taken after a schedule or return of fines made up and filed as at present.

(3) To every such summons a note shall be subjoined that cause may be shown by affidavit sworn before a Justice of the Peace or commissioner, and transmitted by post to the Prothonotary, or to the Judge who imposed the fine.

(4) Where such affidavit is transmitted to the Judge, he shall thereupon have power to remit or mitigate the fine; and in default of any order to that effect the fine shall be enforced.

Recovery of
other fines.

11 Vic. No. 20,
s. 42.

88. Except as hereinbefore provided—

- (a) all fines imposed under this Act by the Supreme Court or a Circuit Court or by a Judge thereof shall be levied and recovered in the same manner as any other fines imposed by the Supreme Court, or in the manner appointed by law for the recovery of fines imposed by justices of the peace;
- (b) all fines imposed under this Act by a Court of Quarter Sessions or by a chairman thereof, shall be levied and recovered in the manner appointed by law for the recovery of fines imposed by justices of the peace.

SCHEDULES.

FIRST SCHEDULE.

Reference to Act.	Title or Short title.	Extent of Repeal.
5 Vic. No. 4 ..	An Act to make further provision for the trial of Cases in the Circuit Courts of New South Wales and to amend in certain respects the Act providing for trial by Jury in such Courts.	The unrepealed portion.
11 Vic. No. 20 ..	An Act to consolidate and amend the laws relative to Jurors and Juries in New South Wales.	The whole.
15 Vic. No. 3 ..	An Act to amend in some respects the Act passed to consolidate the laws relating to Juries.	The unrepealed portion.
15 Vic. No. 16 ..	An Act to repeal so much of the Local Ordinances second William the Fourth number twelve sixth Victoria number fifteen seventh Victoria number nineteen eighth Victoria number four and eleventh Victoria number twenty as assumes to vest the appropriation of the Ordinary Revenue elsewhere than in the Legislative Council.	So much as refers to 11 Vic. No. 20.
18 Vic. No. 18 ..	An Act further to amend the Jury Act	The whole.
20 Vic. No. 31 ..	The Common Law Procedure Act of 1857.. ..	The unrepealed portion
22 Vic. No. 18 ..	District Courts Act of 1858.. .. .	Sections 51, 52, 53, and 57.
22 Vic. No. 25 ..	District Courts Act Amendment Act of 1859..	Section 5.
31 Vic. No. 5 ..	Volunteer Force Regulation Act of 1867 ..	Secs. 37 and 38.
37 Vic. No. 8 ..	Jury Laws Amendment Act of 1874.. ..	The whole.
40 Vic. No. 6 ..	Jury Laws Amendment Act of 1876.. ..	The whole.

Sch. 1.

Reference to Act.	Title or Short Title.	Extent of Repeal.
46 Vic. No. 17 ..	Criminal Law Amendment Act of 1883.. ..	Sections 336, 337, 338, and 340.
51 Vic. No. 10 ..	An Act to amend the Law relating to the Return of Jury Fees.	The whole.
55 Vic. No. 5 ..	Criminal Law and Evidence Amendment Act of 1891.	Section 34.

SECOND SCHEDULE.

Sec. 10.

District of

To the Chief Constable of the district of

Take notice that you are hereby required to make out during the second, third, and fourth weeks of November next ensuing a true list in writing in the form hereunto annexed of all men within the jurors' district for liable to serve on juries according to the Jury Act, 1901.

C.P.S.

THIRD SCHEDULE.

Sec. 10.

List of all persons within the jurors' district for liable to serve on juries.

District (and street, if in a town).	Christian and surname (full length).	Title, quality, calling, or business.	Nature of qualification.
Parramatta ..			Freehold, £100 per annum.
Macquarie-street ..	Adams, John ..	Esquire	£400 of personal estate.
Sydney ..			
George-street ..	Bowles, James ..	Grocer	

FOURTH SCHEDULE.

Sec. 12.

Jury list for 19 ..

Notice is hereby given that I have caused a list to be made out of persons within the jurors' district for [place] liable to serve as jurors either special or common during the year 19 .., and that a copy of such list lies for inspection in the office of the clerk of Petty Sessions in .. street, in this city (or town) and that the Justices in Petty Sessions will, on Tuesday, the .. day of December next, at the police office, in .. street, proceed to examine and correct the said list, when all persons having any objection to offer thereto may attend if they shall think fit.

Saturday, November, 19 ..

A.B.,

Chief Constable.

FIFTH SCHEDULE.

Secs. 34-36.

Form of precept.

(To be adopted for general, special, or common juries of twelve and juries of four.)

To the Sheriff of .. or his deputy greeting,—

Pursuant to the Act in such case made and provided you are hereby commanded that you cause to come before [here insert the style of the court] to be holden at the court-house at .., on [here insert the day of the week] the .. day of .. now next [or instant] .. good and lawful men of the jurors' district for .. aforesaid duly qualified according to law as jurors (or as "common jurors" or "special jurors" according as the precept shall be intended to be a "general jury precept," "common jury precept," or "special jury precept") to make a jury of the country for the trial of all such issues of fact or other matters as shall be then required to be tried by a general jury of twelve men (or by a common jury or a special jury of four or of twelve men according as the precept shall be intended). And that you have

Sch. 8. then there the names of those jurors as by the law is required of you, together with due proof of the service of a summons upon such of the said jurors as shall have been served and of the time and manner thereof and of the causes wherefore the others of such jurors have not been served with such summons and also this writ.

Given under my hand and seal at this day of A.D. 19 .

Sec: 46

SIXTH SCHEDULE.

Form of summons.

Mr. A.B. (*naming the juror*), you are hereby required to appear as a juror in the Supreme or Circuit Court or Court of Quarter Sessions (*naming the court*) to be holden at on [*here insert the day of the week*] the day of next, at ten o'clock in the forenoon, and you are there to attend from day to day until you shall be discharged by the said court under penalty of the fine by law imposed in this behalf.

(Signed)

C.D.

Sheriff.

JURY (AMENDMENT) ACT 1902.

ACT No. XXVIII, 1902.

An Act to amend the Jury Act, 1901, and to validate certain jury lists. [Assented to, 22nd December, 1902.]

BE it enacted by the King's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and Legislative Assembly of New South Wales in Parliament assembled, and by the authority of the same, as follows:—

1. This Act may be cited as the "Jury (Amendment) Act, 1902," and shall be construed with the Jury Act, 1901, herein-after in this Act called the Principal Act. Short title.

2. Section eight of the Principal Act is amended by the addition of the following paragraph:— Parramatta juror's district.

"All other parts of the County of Cumberland without the said Sydney police district and radius of twelve miles from the Sydney Town Hall, shall be the jurors' district for the town of Parramatta."

3. Subsection (1) of section nine of the Principal Act is repealed, and the following subsection substituted in lieu thereof:— Juror's districts for towns other than Sydney and Parramatta.

"The jurors' district for every other town or place at which any Court for the trial by jury of civil and criminal issues and the assessment of damages, or any Court of Quarter Sessions, or any District Court, is appointed to be held, shall comprise the land within a radius of thirty miles from every such town or place: Provided that any juror residing within the juror's district of two or more courts shall only be liable to serve at the court nearest to his place of residence."

4. Section thirteen of the Principal Act is amended by the substitution of the words "during the second week" for the words "on the second Tuesday" where they occur in that section. Special petty sessions to be summoned during the second week in December of each year.

5. All jury lists for the year one thousand nine hundred and three, made and prepared before the passing of this Act in accordance with the provisions of the Principal Act as amended by this Act, shall be valid. Validation of jury lists for 1903.

S. 1.

JUDGMENT CREDITORS' REMEDIES ACT 1901.

COMMISSIONER'S MEMORANDUM AND CERTIFICATE.

THIS Bill consolidates the whole or part of the following Acts:—

- 3 Vic. No. 18 ;
- 5 Vic. No. 9 ;
- 7 Vic. No. 13 ;
- 7 Vic. No. 16 ;
- 10 Vic. No. 7 ;
- 12 Vic. No. 1 ;
- 13 Vic. No. 12 ;
- 17 Vic. No. 21 ;
- 20 Vic. No. 31 ;
- 22 Vic. No. 1 ;
- 22 Vic. No. 18 ;
- 37 Vic. No. 11 ;

Clause 3. Fresh jurisdictions of the Supreme Court have been created since the passing of the original Acts, and this clause includes them all.

Clause 4. It appears never to have been decided whether the words "or any inferior Court" include the District Court which was not in existence when the original section became law.

Clause 9. "Sheriff's" has been omitted before "poundage" because the officer may have been the officer of some other Court.

Clause 10. The question has arisen for consideration whether the repeal by 12 Vic. No. 1, sec. 5, of the power to sell choses in action repeals the power given by 5 Vic. No. 9, sec. 31, to seize them in execution. See an article in the Weekly Notes cover of 23rd February, 1899, and the case of *Blair v. Blair*, 18 N.S.W.R. Eq., p. 47. It has been decided that the power to seize not having been expressly taken away should remain for what it is worth. It may possibly have some bearing on the rules as to the time from which the chose in action is bound.

Clause 10-12. The word "defendant" in the original sections evidently meant the person against whom the writ was sued out, who might in some cases be the plaintiff in the action.

Clause 12. A point arising under the sections here consolidated was discussed but not decided by the late Mr. Chief Judge Manning in *Irving v. The Commercial Banking Co.*, 19 N.S.W.R. Eq., pp. 57-58. It has been decided that all the provisions as to registration ought to be omitted.

Clause 13 (2). "Or hereditaments" omitted after land as unnecessary. See Interpretation Act and 54 Geo. III, c. 15. "Or" is changed to "on." It was evidently a mistake.

Clause 27 (1) (a). "Or" before "in his own right" was a slip and is removed.

§. 1.

Clause 27 (1) (b). The words "which at law cannot be taken in execution" are omitted. Originally they were words of description, but if allowed to remain the 5 Vic. No. 9, sec. 31, might appear to give them a different meaning.

I certify that, save as aforesaid, this Bill solely consolidates, and in no way alters, adds to, or amends the law as contained in the Acts thereby consolidated.

CHAS. G. HEYDON,

Commissioner for the Consolidation of the Statute Law.

TABLE

Showing how the sections of Acts consolidated have been dealt with.

Section of Repealed Acts.	Section of Consolidated Act.	Remarks.
3 Vic. No. 18, s. 1	4-9.	
2	27	
3	28-32	
4	33	
5	3 (4)	
6	.....	Date of commencement.
5 Vic. No. 9, s. 31	10-12	Proviso as to registration omitted. See
43	3	22 Vic. No. 1, s. 3.
7 Vic. No. 13, s. 3	23	
7 Vic. No. 16, s. 15	.....	} Exhausted by repeals in other Acts.
18	.....	
20	.....	
21	13	
22	.....	Exhausted by repeals in other Acts.
10 Vic. No. 7, s. 1	.....	Repealing section only.
2	.....	Obsolete, applies to Courts of Request.
3	19-21	Actions for criminal conversation abolished. See Act No. 14, 1899, s. 92.
12 Vic. No. 1, s. 5	10	
13 Vic. No. 12, s. 1	26	The unrepealed part to be dealt with in another Bill.
17 Vic. No. 21, s. 100	24	
20 Vic. No. 31, s. 54	22	
22 Vic. No. 1, s. 2	14	
3	12, 15	
22 Vic. No. 18, s. 84	17, 18	Part already consolidated in District Courts Act, 1901. As to warrants for the possession of premises, see Land- lord and Tenant Act, of 1899, s. 19 (2).
37 Vic. No. 11, s. 4	25	Part of section to be dealt with in Defama- tion Bill.
5	25	Unrepealed part to be dealt with in another Bill.
52 Vic. No. 8, s. 1, 2	16	
3	.....	Short title.

S. 1.

ACT No. VIII., 1901.

An Act to consolidate the enactments relating to the remedies of judgment creditors. [Assented to, 3rd October, 1901.]

BE it enacted by the King's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and Legislative Assembly of New South Wales in Parliament assembled, and by the authority of the same, as follows :--

PART I.

PRELIMINARY.

Short title and
division.

1. This Act may be cited as the "Judgment Creditors' Remedies Act, 1901," and is divided into Parts, as follows :—

PART I.—PRELIMINARY—ss. 1–2.

PART II.—SUPREME COURT RULES, DECREES, AND ORDERS—s. 3.

PART III.—EXECUTION AGAINST PROPERTY—ss. 4–18.

PART IV.—EXECUTION AGAINST THE PERSON—ss. 19–26.

PART V.—CHARGING ORDERS—ss. 27–33.

Repeal.
Schedule.

2. (1) The Acts mentioned in the Schedule to this Act are to the extent therein expressed hereby repealed.

Rules of Court
&c., under Acts
hereby
repealed.

(2) All rules of Court and orders made and all writs framed under the authority of any Act hereby repealed and being in force at the time of the passing of this Act shall be deemed to have been made and framed under the authority of this Act.

PART II.

SUPREME COURT RULES, DECREES, AND ORDERS.

Rules, decrees,
and orders to
have effect of
judgments.
5 Vic. No. 9,
s. 43.

3. (1) All rules, decrees, and orders of the Supreme Court in any of its jurisdictions, whereby any sum of money or any costs, charges, or expenses are payable to any person, shall have the effect of judgments at law, and such person may have execution thereon for the moneys so payable.

(2) The Judges of the said Court may cause writs of execution to be framed accordingly and to issue as they think fit.

(3) All such writs shall be enforced in the same manner as writs of execution are in ordinary cases.

8 Vic. No. 18,
s. 5.

(4) Such person shall also be entitled to all remedies by this Act given to judgment creditors.

Though rules, &c., are to have the effect of judgments, it does not follow that they can be treated as judgments for all purposes; e.g., to found a garnishee order upon: see *Cremetti v. Crom*, 4 Q.B.D. 225; and compare *Re Richards*, (1902) 19 W.N. 152; *Zaccour v. Basha*, (1899) 20 N.S.W.R. 431; 16 W.N. 74, 107; *Ex parte Carrington C. S. Co.*, (1901) 18 W.N. 244.

PART III.

S. 4.

EXECUTION AGAINST PROPERTY.

4. The sheriff or other officer having the execution of any writ of *fi. fa.* sued out of the Supreme Court or any inferior Court, or any precept in pursuance thereof, may and shall seize and take thereunder—

- (a) any money ; and
 - (b) any bank note of any banking society or company established in New South Wales or elsewhere ; and
 - (c) any cheque, bill of exchange, promissory note, bond, specialty, or other security for money—
- belonging to the person against whom such writ is sued out.

As to execution, see also C.L.P. Act, ss. 130–139 (*ante*) ; and RR. 182–206 (*post*).

The general rule of law was that the Sheriff under a writ of *fi. fa.* might seize and sell all the personal goods and chattels belonging to the debtor that he could find, and which could be sold, with the exception of wearing apparel actually in use and perhaps goods in the personal possession of the debtor : Chitty's Archbold, p. 652 ; *Searson v. Flannery*, (1898) 15 W.N. 91. By the statutes consolidated in the present Act, the operation of the writ was enlarged.

Any money.—The section applies to moneys set apart and earmarked, and the property specifically of the party against whom the *fi. fa.* issues, and under his possession and control ; thus, money in the hands of the Sheriff for an execution creditor cannot be taken in execution against that creditor under a *fi. fa.* : *Wood v. Wood*, 4 Q.B. 897 ; 12 L.J.Q.B. 141 ; *v. Bell v. Hutcheson*, 8 Jur. 195. Money seized under a *fi. fa.* is in exactly the same position as money the proceeds of goods seized : *Colingridge v. Paxton*, 11 C.B. 683 ; 21 L.J.C.P. 39 ; *Squire v. Huetson*, 1 Q.B. 308.

The section gives no power to seize money in the hands of a third person as trustee for the debtor : *France v. Campbell*, 6 Jur. 105 ; *Brown v. Perrott*, 4 Beav. 585.

An order may be obtained from the Equity side of the Court charging money standing to the credit of a judgment debtor in the Court : *Watts v. Jefferyes*, 3 Mac. & G. 422 ; 15 Jur. 435 ; *Brereton v. Edwards*, 21 Q.B.D. 488 ; by analogy to the rights given by this section.

Any cheque, etc.—A cheque drawn in favour of A., but not delivered to him, is not his property so as to be liable to seizure : *Courtney v. Vincent*, 15 Beav. 486 ; 21 L.J. Ch. 291 ; see *Watts v. Jefferyes*, *supra*.

A policy of insurance by a debtor on his own life is not a security for payment of money : *In re Sargent's Policy*, 7 L.R. Ir. 66.

Partnership.—By s. 23 of the Partnership Act, 1892, it is provided as follows :—

(1) After the commencement of this Act a writ of execution shall not issue against any partnership property except on a judgment against the firm.

(2) The Supreme Court, or a Judge thereof, may on the application by summons of any judgment creditor of a partner, make an order charging that partner's interest in the partnership property and profits with payment of the amount of the judgment debt and interest thereon, and may by the same or a subsequent order appoint a receiver of that partner's share or profits (whether already declared or accruing) and of any other money which may be coming to him in respect of the partnership, and direct all accounts and inquiries, and give all other orders and directions which might have been directed or given if the charge had been made in favour of the judgment creditor by the partner, or which the circumstances of the case may require.

(3) The other partner or partners shall be at liberty at any time to redeem the interest charged, or in the case of a sale being directed, to purchase the same. Costs of the application for the order cannot be given : *Booker v. Gill*, (1898) 15 W.N. 158.

Assignment by the execution debtor after the issue of *fi. fa.* but before the summons under this section, is good, and prevents the order being made ; the provisions of 29 Car. II, c. 3, s. 16 (see s. 13, note (*post*)) ; do not apply : *Brown v. Morrison* (1899) 16 W.N. 124.

Defamation Act.—By s. 23 of the Defamation Act, 1901, it is provided as follows :—

Money, bank-notes, &c., may be taken in execution.
3 Vic. No. 18, s. 1.

8. 4.

When any person is convicted either in a civil or criminal proceeding of printing or publishing a defamatory article, the plaintiff or prosecutor in whose favour judgment is given may, under his writ of execution, levy the costs, damages, penalty, and expenses named therein, out of the whole of the types, presses, or printing materials whatsoever, belonging to the person whose types, presses, and printing materials, or any part thereof, have been used in printing such defamatory article, as well as out of the property of the defendant on the record.

But, query, on this rather obscure section, whether the presses, &c., could be followed into the hands of a purchaser from the actual printer of the article.

Bankruptcy.—As to the Sheriff's duty in the event of the bankruptcy of the debtor, see Bankruptcy Act, 1898, ss. 53, *et seq.*

Money or bank-
notes may be
delivered to
judgment
creditor.
3 Vic. No. 18,
s. 1.

5. Such sheriff or officer shall pay or deliver to the person suing out such writ any money or bank-notes so seized or a sufficient part thereof.

Negotiable in-
struments, &c.,
how dealt with.
Ibid.

6. Such sheriff or officer shall hold any such cheque, bill of exchange, promissory note, bond, specialty, or other security for money as a security for the amount by such writ directed to be levied, or so much thereof as has not been otherwise levied and raised, and may sue in the name of such sheriff or officer for the recovery of the sum secured thereby if and when the time of payment thereof has arrived.

Payment to
sheriff, &c., to
be a discharge.
Ibid.

7. The payment to such sheriff or officer by the person liable on any such cheque, bill of exchange, promissory note, bond, specialty, or other security, with or without suit, or the recovery and levying execution against the person so liable, shall discharge him, to the extent of such payment or of such recovery and levy in execution, from such liability.

Sheriff not
bound to sue
unless indem-
nified.
Ibid.

8. No such sheriff or officer shall be bound to sue any person so liable unless the person suing out such writ enters into a bond with two sufficient sureties for indemnifying him from all costs and expenses to be incurred in the prosecution of such action, or to which he may become liable in consequence thereof, the expense of such bond to be deducted out of any money to be recovered in such action.

Proceeds of
levy how
disposed of.
Ibid.

9. Such sheriff or officer shall pay over to the person suing out such writ the money so recovered or such part thereof as is sufficient to discharge the amount by such writ directed to be levied, and if after satisfaction of the amount so to be levied together with poundage and expenses any surplus remains in the hands of such sheriff or officer, the same shall be paid to the person against whom such writ has been sued out.

Equities of
redemption, &c.
5 Vic. No. 9,
s. 31.
12 Vic. No. 1,
s. 5.

10. The sheriff to whom any writ of *feri facias* issued out of the Supreme Court is directed may—

- (a) take in execution any equity of redemption or other equitable interest, or any chose in action, of or belonging to the person against whom such writ is sued out; and
- (b) cause to be put up for sale and sold under such writ such equity of redemption or other equitable interest.

The estate of the mortgagor under the Real Property Act is an Equity of redemption, and the sale must be advertised under the section next following: *Coleman v. De Lissa*, (1885) 6 N.S.W.R. Eq. 104.

Though a chose in action may under this section be taken in execution by the Sheriff, yet apparently it cannot be sold : *Blair v. Blair*, (1897) 18 N.S.W.R. Eq. 47 ; 13 W.N. 215. This seems a curious position : see an article in the Weekly Notes cover of 23rd Feb., 1899, where it is suggested that the creditor might obtain a charging order under the 3 Vic. No. 18, s. 2, now s. 27 (*post*), q.v.

S. 10.

11. Such sale shall be by public auction, and in cases of equity of redemption shall be previously advertised in the Gazette and in one newspaper or more at least one month before the same takes place.

Sale to be by
by auction.
5 Vic. No. 9,
s. 31.

12. (1) Such sale shall be as valid and effectual to pass all such person's right and title to and interest in such equity or equitable interest as if the same had been conveyed or assigned to the purchaser by such person himself.

Sale to have
effect of assign-
ment.
Ibid.

(2) Provided that where any such equity or equitable interest relates to real estate, a deed of bargain and sale thereof or of such person's right and title to and interest therein shall be executed by such sheriff to such purchaser.

Conveyance by
sheriff.
Ibid.
22 Vic. No. 1,
s. 3.

13. (1) No judgment recovered or to be recovered in any action at law shall bind or affect or be deemed to have bound or affected any land in New South Wales.

Judgment not
to bind land.
7 Vic. No. 16,
s. 21.

(2) Provided that every writ of execution on any such judgment against the land of the person against whom such judgment is obtained, when delivered to the sheriff or to the sheriff of any district shall affect and be deemed to have bound such land from the time of such delivery in like manner as a writ of *feri facias* binds goods and chattels.

Writ of execu-
tion to bind
land when
delivered.

In like manner, etc.—By s. 16 of the Act 29 Car. II, c. 3, "No writ of *fi. fa.* or other writ of execution shall bind the property of the goods of the party against whom such writ of execution is sued forth, but from the time such writ shall be delivered to the Sheriff, under-sheriff or coroner to be executed, and for the better manifestation of the said time, the Sheriff, under-sheriff and coroner, their deputies and agents, shall, upon the receipt of any such writ (without fee for doing the same) indorse upon the back thereof the day of the month or year whenever he or they received the same."

This statute was intended only to protect purchasers from any injury which might arise to them from the relation which writs of execution had to their *teste* at common law (by which they bound property from the date of the *teste*) ; and therefore, as far as relates to the party himself, and to all others but purchasers for a valuable consideration, writs of execution bind the party's goods from the time of their *teste* : 1 Saund. 219, f. The meaning of the words "that the goods shall be bound by the delivery of the writ to the Sheriff" is that after the writ is so delivered, if the defendant makes an assignment of the goods, even for valuable consideration, the Sheriff may take them in execution : *per Lord Hardwicke*, in *Louthal v. Tompkins*, B.N.P. 90 ; *R. v. Wells*, 16 East, 278, n. ; *Payne v. Drewe*, 4 East, 523, *per Lord Ellenborough* ; *Harding v. Hall*, 10 M. & W. 47, *per Parke*, B. : Chitty's Archbold, 616.

Remedy of a judgment creditor against the lands of the debtor was given by the Act, 54 Geo. III, c. 15, s. 4, entitled "An Act for the more easy recovery of debts in His Majesty's Colony of New South Wales."

On the effect of a sale of land under *fi. fa.* see *Maclean v. Dight*, (1866) 5 S.C.R. 95 ; *Bullen v. a'Beckett*, 1 Moore P.C. N.S. 223 ; *Re Elliott*, (1886) 7 N.S.W.R. 271 ; *Blaxland v. Grattan*, (1887) 8 N.S.W.R. 287 ; *Smith v. Deane*, (1889) 10 N.S.W.R. Eq. 207 ; *Smith v. Smythe*, (1890) 11 N.S.W.R. 295 ; *Coleman v. De Lissa*, (1885) 6 N.S.W.R. Eq. 104 ; *Law v. Nixon*, (1890) 7 W.N. 49.

So far as regards land registered under the Real Property Act, see now s. 105 of the Consolidating Act of 1900, No. 25, by which it appears that such land is not bound until notice of the writ has been given to the Registrar-General, and entry made on the register : see *Coleman v. De Lissa*, and *Re Elliott*, *supra*.

- S. 13.** Personal estate is to be sold before land, unless the debtor otherwise desires, or in the Sheriff's opinion it would be inadvisable : R. 197 ; and the debtor may point out the part of his land he wishes sold first : R. 198 (*post*).

Sales of land by sheriff.

22 Vic. No. 1, s. 2.

14. It shall not be necessary for any sheriff to make an actual seizure of land under any writ in order to authorise a sale thereof ; but instead of such seizure he shall cause notice of the writ and of the intended day and place of sale and the particulars of the property to be published in such manner as the Judges of the Supreme Court from time to time direct ; and the publication of such notice shall be equivalent to an actual levy by him on the land indicated by such notice.

The only "direction by the Judges" is contained in R. 202 (*post*).

Deeds of sale by sheriff:

Ibid. s. 3.

15. Every deed of sale heretofore or hereafter executed by any sheriff of the land of a judgment debtor, or of the right, title, and interest of such debtor to and in any land, shall be evidence of the existence of a valid judgment and writ to support a levy by such sheriff on the land and of the fact of a levy having been duly made on such land if stated in the deed, or of such notice as aforesaid having been duly published if that fact be so stated.

Goods subject to bill of sale.

52 Vic. No. 8, s. 1.

16. (1) Whenever legal process issues against the goods of a judgment debtor for the execution of a judgment of any Court, and such goods are the subject of a conditional bill of sale, the sheriff, bailiff, or officer charged with the execution of such process may sell the right, title, and interest of the judgment debtor in such goods without levying thereon.

Upon notice of sale grantee of bill of sale may take possession.

Ibid.

(2) Upon notice in writing of the purchase of such right, title, and interest being given to the person in whose favour such bill of sale has been made, or to his executors, administrators, or assigns, such person, or his executors, administrators, or assigns may take possession of the said goods, and shall be deemed to hold the said goods for the use of the purchaser of such right, title, and interest, subject to the amount due and payable under such bill of sale.

Disposal of proceeds of sale of goods.

Ibid.

(3) Upon the said goods being afterwards sold under such bill of sale, and there being any surplus remaining out of the proceeds thereof after paying the said amount, the person in whose favour such bill of sale has been made, or his executors, administrators, or assigns, shall upon demand pay over such surplus to such purchaser, and in default thereof shall be liable to an action to the extent of such surplus at the suit of such purchaser for money received for the use of such purchaser.

Saving of interpleader process.

Ibid. s. 2.

(4) Nothing herein shall be deemed to affect the right of any execution creditor to test the validity of any bill of sale by interpleader process.

As to interpleader, see Interpleader Act, (*ante*).

Priority of execution issuing out of Supreme and District Courts.

22 Vic. No. 18, s. 84.

17. (1) When a writ against the lands or goods of a party to any suit issues out of the Supreme Court, and a warrant or writ of execution against the lands or goods of the same party issues out of any District Court, the right to the property seized shall be determined by the priority of the time of the delivery of

the writ so issued out of the Supreme Court to the sheriff to be executed, or of the application to the registrar for the issue from such District Court of the warrant or writ of execution.

S. 17.

(2) The sheriff shall on demand inform the registrar of such District Court of the precise time of such delivery of the writ so issued out of the Supreme Court; and such registrar shall on demand inform the sheriff or any sheriff's officer of the precise time of the application to such registrar for the issue from such District Court of the warrant or writ of execution.

18. Any warrant granted in pursuance of any writ of execution issued out of the Supreme Court and the indorsement thereon shall be sufficient justification to any bailiff or sheriff's officer acting thereon.

Warrant to justify officer acting thereon.
22 Vic. No. 18, s. 84

PART IV.

EXECUTION AGAINST THE PERSON.

19. Except as hereinafter provided no person shall be arrested on any writ of *capias ad satisfaciendum* issuing out of the Supreme Court.

Limitation of arrest under *ca. sa.*

10 Vic. No. 7, s. 3.

For the practice on execution by *ca. sa.* see Chitty's Archbold, 694, *et seq.*

If there be anything improper or irregular in the issue or execution of the writ, the Court or a Judge may order the discharge of the prisoner. The writ may be amended: as where it did not correspond with the judgment as to amount: *Nicholls v. Rosenfeld*, (1886) 7 N.S.W.R. 322; 3 W.N. 19. A previous writ in the same case had been set aside on the ground that it had issued before costs had been taxed, and therefore before final judgment had been signed: *Nicholls v. Rosenfeld*, (1886) 2 W.N. 78; but see *Martin v. Fletcher*, (1898) 14 W.N. 158.

A member of the State Parliament is not privileged from arrest on *ca. sa.*: *Norton v. Crick*, (1894) 15 N.S.W.R. 172; 10 W.N. 197.

A *ca. sa.* cannot issue on an order under s. 416 of the Criminal Law Amendment Act: *Zaccour v. Basha*, (1899) 20 N.S.W.R. 431; 16 W.N. 74, 107.

20. If a Judge of the said Court is satisfied by affidavit that the defendant—

Fraudulent concealment or intended departure.

(a) fraudulently conceals money, goods, or valuable securities from his judgment creditor, or

Ibid.

(b) is about to leave New South Wales without satisfying the judgment,

the said Judge shall order such writ to issue, and the defendant may be arrested on such writ.

21. Nothing in this Part hereinbefore contained shall extend to any such writ issued in an action for breach of promise of marriage, libel, slander, seduction, or any malicious injury.

Actions for malicious injuries.

Ibid.

As to the effect of the bankruptcy of the debtor, see note to s. 25 (*post*).

1899, No. 14, s. 92.

22. Where a defendant has been arrested or has given bail upon a writ of *capias ad respondendum*, a writ of *capias ad satisfaciendum* may be issued to fix the bail or charge the defendant in execution as of course.

Ca. sa. to fix bail.

20 Vic. No. 31, s. 54.

Ca. re.: see Arrest on Mesne Process Act, (*ante*).

Ca. sa. to fix bail, see R. 205 (*post*).

S. 23.

Liability for
escape.

7 Vic. No. 13,
s. 3.

23. If any debtor in execution escapes out of legal custody, the sheriff, bailiff, or other person having the custody of such debtor shall be liable only to an action upon the case for damages sustained by the person at whose suit such debtor was taken or imprisoned, and shall not be liable to any action of debt in consequence of such escape.

Discharge of
judgment
debtor on
authority of
attorney.

17 Vic. No. 21,
s. 100.

24. (1) A written order under the hand of the attorney in the cause by whom any writ of *capias ad satisfaciendum* has been issued shall justify the sheriff, gaoler, or person in whose custody the party may be in discharging such party unless the party for whom such attorney professes to act has given written notice to the contrary to such sheriff, gaoler, or person.

(2) Such discharge shall not be a satisfaction of the debt unless made by the authority of the creditor.

(3) Nothing herein contained shall justify any attorney in giving such order for discharge without the consent of his client.

Payment of the sum endorsed on the writ cannot be made to the Sheriff or gaol keeper, but must be made to the other party or his attorney on the record: Chitty's Archbold, 702. As to discharge after a year, where the amount is under £20, see R. 206 (post).

Discharge of
judgment
debtor on
bankruptcy.

37 Vic. No. 11,
s. 6.
1898, No. 25,
s. 133 (3).

25. (1) Any person in the custody of any sheriff, gaoler, or officer in execution of a judgment (not being a judgment obtained under the Act Eleventh Victoria number thirteen) under a writ of *capias ad satisfaciendum* issued out of the Supreme Court or a District Court shall upon the sequestration of his estate in pursuance of the law in force for the time being relating to bankruptcy be entitled to his discharge from such custody on the order of the Judge in Bankruptcy, and shall be forthwith discharged from such custody either absolutely or on such conditions as the said Judge may impose.

(2) Provided that if such person is in custody under any such writ issued to restrain him from leaving New South Wales under the provisions of any enactment in that behalf, he shall not be entitled to his discharge unless he finds security in such manner and to such amount as the said Judge may order conditioned that he will not remove from New South Wales until he has received his certificate in due course of law under the law relating to bankruptcy or has been otherwise lawfully released from his bankruptcy.

(3) No such sheriff, gaoler, or officer shall incur any liability in respect of such discharge to any judgment creditor or other person for anything done by him under this section.

The Act 11 Vic. No. 13. now the Defamation Act, 1901 (No. 22).—By s. 24 of this Act it is provided as follows:—

(1) No law now or hereafter in force for the relief of insolvent debtors, or for the abolition of imprisonment for debt shall be construed to extend to affect or discharge from his liability any defendant indebted for any penalty, damages, or costs adjudged against him in any proceeding, either civil or criminal, for the printing or publishing of any blasphemous, seditious, or defamatory words or libel.

(2) Provided that any such defendant who has been for a period of twelve months in the custody of the Sheriff, or of any gaoler or officer in execution of any judgment obtained under this Act, shall be entitled to his discharge from

37 Vic. No. 11,
s. 4.

such custody and shall be forthwith discharged therefrom after sequestration of his estate (made at any time whilst he has been in custody on such execution) on the order of the Judge in Bankruptcy directed to such gaoler or officer.

S. 25.

(3) No such Sheriff, gaoler, or officer shall incur any liability whatsoever in respect of such discharge to any judgment creditor or other person for anything done by him under this section.

A plaintiff in a defamation action cannot be imprisoned for costs: *Eckford v. Scholey*, (1871) 10 S.C.R. 79.

As to the effect of insolvency under the old law, see *Webb v. Wilton*, (1867) 6 S.C.R. 374; *Ex parte Gee*, (1867) 6 S.C.R. 355.

Proof in insolvency for the debt was held not to take away the creditor's rights under the section of the Defamation Act: *Nicholls v. Rosenfeld*, (1886) 7 N.S.W.R. 322; 3 W.N. 19. On the other hand the creditor could prove in the estate after he had issued his *ca. sa.*: *In re G. R. Dibbs*, (1881) 2 N.S.W.R. 10.

Under the later Bankruptcy Acts, see *In re Goode*, (1890) 1 B.C. 9; Bankruptcy Act, 1898, s. 10 (3).

26. Any writ of *capias ad satisfaciendum* issued out of the Supreme Court may be lawfully executed upon a Sunday.

Ca. sa. may be executed on Sunday.
13 Vic. No. 12, s. 1.

PART V.

CHARGING ORDERS.

27. (1) If any person against whom any judgment has been entered up in the Supreme Court—

Order charging stock, shares, equities, &c.

(a) has any stock or shares of or in any public company (whether incorporated or not), or any deposit in any bank of New South Wales, standing in his name in his own right, or in the name of any person in trust for him; or

3 Vic. No. 18, s. 2.

(b) has or is entitled to any equity of redemption or other equitable interest,

a Judge of the said Court on the application of any judgment creditor may order that such stock shares or deposit, or such equity of redemption or equitable interest, or such of them or such part thereof respectively as he thinks fit, shall stand charged with the payment of the amount for which judgment has been so recovered and interest thereon.

(2) Such order shall entitle the judgment creditor to all such remedies as he would have been entitled to if such charge had been made in his favour by the judgment debtor:

(3) Provided that no proceedings shall be taken to have the benefit of such charge until after the expiration of three months from the date of such order.

It has been held in England (under the corresponding Act, 1 & 2 Vic. c. 110) that an application to charge shares will not be entertained where the shares having been sold by the debtor, he has become a trustee for the purchaser: *Gill v. The Continental Union Gas Co.*, L.R. 7 Ex. 332; but such an order seems to have been made here: *Blow v. Constable*, (1886) 3 W.N. 24, and such orders were frequently made in England, leaving the question of the alleged trust to be settled in a Court of Equity: *Cragg v. Taylor*, L.R. 1 Ex. 148; *Nicholls v. Rosewarne*, 28 L.J.C.P. 273; *Fuller v. Earle*, 21 L.J. Ex. 314. The debtor's interest in stock or shares held by a third person for his benefit may be charged by a charging order: *South Western Loan Co. v. Robertson*, 8 Q.B.D. 17; *Service v. Flatau*, (1900) 16 W.N. 248; not so his interest in the proceeds of sale of a testator's residuary estate, part of which consists of stock or shares: *Dixson v. Wrench*, L.R. 4 Ex. 154; but see *Union Bank v. O'Leary*, (1897) 13 W.N. 124, where an order under this section was made charging the interest of a debtor as one of the next of kin in the estate of an intestate.

S. 27.

A debt of or voluntary allowance made by a company, not being a share in its capital, cannot be the subject of a charging order : *Morris v. Manisty*, 7 Q.B. 674 ; 14 L.J.Q.B. 285. Part as well as the whole of a sum of stock may be charged : *Stanley v. Bond*, 8 Beav. 50 ; 14 L.J. Ch. 51.

Though an order under the Crimes Act, s. 457, is to have the effect of a judgment, yet a charging order will not be made on such an order : *Ex parte Carrington Coal Shipping Co.*, (1901) 18 W.N. 244.

Order in first instance to show cause.

3 Vic. No. 18, s. 3.

28. Every such order charging any such stock shares or deposit—

- (a) may be made in the first instance *ex parte* and without any notice to the judgment debtor ; and
- (b) shall be an order to show cause only ; and
- (c) shall restrain such company and the accountant and cashier of such bank from permitting the transfer or disposal thereof.

The order *nisi* is made by a Judge at Chambers : *Brown v. Bamford*, 9 M. & W 42 ; and is not subject to appeal : *Baldwin v. Timbrell*, 6 Jur. 488. For form of order see Chitty's Forms, 275 ; but it may be rescinded by the Court before the expiration of the period within which cause is to be shown against it : *Morris v. Manisty*, 7 Q.B. 674 ; 14 L.J.Q.B. 285 ; and see s. 32 (*post*).

The judgment creditor must apparently go into Equity to enforce the charge.

Disobedience of interim order.
Ibid.

29. If after notice of such order to any person to be restrained thereby or, in case of a corporation, to any authorised agent of such corporation, and before such order is discharged or made absolute, such person or corporation permits any such transfer or disposal to be made, such person or corporation shall be liable to the judgment creditor for the value or amount of the property so charged or so transferred or disposed of, or such part thereof as may be sufficient to satisfy his judgment.

Disposition by judgment debtor invalid.
Ibid.

30. No disposition by the judgment debtor in the meantime shall be valid or effectual as against the judgment creditor.

Making order absolute.
Ibid.

31. Unless the judgment debtor within a time to be mentioned in such order shows to a Judge of the said Court sufficient cause to the contrary, such order shall, after proof of notice thereof to the judgment debtor, his attorney or agent, be made absolute.

Discharging or varying order.
Ibid. s. 3.

32. Any such Judge may upon the application of the judgment debtor or any person interested discharge or vary such order and award such costs upon such application as he thinks fit.

Securities not realised to be relinquished if person taken in execution.
Ibid. s. 4.

33. If any judgment creditor, who under the powers of this Part of this Act has obtained any such charge or is entitled to the benefit of any security whatsoever, afterwards and before the property so charged or secured has been converted into money or realised and the produce thereof applied towards payment of the judgment debt, causes the person of the judgment debtor to be taken or charged in execution upon such judgment, then such judgment creditor shall be deemed to have relinquished all right and title to the benefit of such charge or security, and shall forfeit the same accordingly.

SCHEDULE.

Sch. 1.

Reference to Act	Title or short title.	Extent of repeal.
3 Vic. No. 18	An Act for extending the remedies of Creditors against the property of Debtors in New South Wales and the Dependencies thereof.	The whole.
5 Vic. No. 9	An act for the further amendment of the Law and for the better advancement of justice.	Sections 31 & 43.
7 Vic. No. 13	An Act for regulating the appointment and duties of Sheriff in New South Wales.	Section 3.
7 Vic. No. 16	An Act to consolidate and amend the Laws relating to the Registration of Deeds and other Instruments in that part of the Colony of New South Wales not comprehending the District of Port Phillip.	The unrepealed portion.
10 Vic. No. 7	An Act to simplify the Law abolishing Imprisonment for Debt.	The whole.
12 Vic. No. 1	An Act to simplify and alter the Law in some respects.	Section 5.
13 Vic. No. 12	An Act to prevent the escape from the Colony of Fraudulent Debtors.	The whole, except so much as relates to writs of <i>capias ad respondendum</i> .
17 Vic. No. 21	The Common Law Procedure Act of 1853.	The unrepealed portion.
20 Vic. No. 31	The Common Law Procedure Act of 1857.	Section 54.
22 Vic. No. 1	Titles to Land Act of 1858.	Sections 2 and 3.
22 Vic. No. 18	District Courts Act of 1858.	The unrepealed portion of s. 84.
37 Vic. No. 11	An Act to amend the Law of Arrest and Imprisonment on Civil Process.	So much of the proviso to section 4 as relates to section 5 and so much of section 5 as relates to writs of <i>capias ad satisfaciendum</i> .
52 Vic. No. 8	Judgment Creditors' Remedies Extension Act of 1888.	The whole.

LEGAL PRACTITIONERS ACT

1898.

COMMISSIONER'S MEMORANDUM AND CERTIFICATE.

THIS Bill consolidates the following Acts :—

- 11 Vic. No. 33 ;
- 11 Vic. No. 57 ;
- 20 Vic. No. 14 ;
- 22 Vic. No. 23 ;
- 39 Vic. No. 32 ;
- 46 Vic. No. 2 ;
- 55 Vic. No. 31.

Section X of the Charter of Justice has not been introduced into this consolidation, as it rests upon the authority of an Imperial Act, and is not itself a statute at all, and for various reasons it seems hardly advisable to cut it up and distribute its various clauses amongst our own Acts of legislation.

Clause 3. To prevent any possible argument that the Bill applies to any but legal persons entitled to practise in New South Wales " barrister " has been defined to mean a barrister-at-law admitted by the Supreme Court.

In the same clause under the definition of " University graduate " the words " of Sydney " are new. The Act 20 Vic. No. 14, sec. 1, dispenses graduates in *Arts* in the Sydney University from the examinations under 11 Vic. No. 57, except as to the law examination. The Act 22 Vic. No. 23, sec. 1, gives a similar privilege to graduates in *Arts* or in *Law* or in *Medicine* in the universities of Oxford or Cambridge, or in any university granting degrees by virtue of any Statute or Royal Charter or Colonial Act assented to by Her Majesty or any of her predecessors. The result of this was to give to graduates in Law or Medicine in (say) the university of Melbourne a position of superiority over those in our own university. It seemed that a distinction so invidious had been created by oversight and not by the deliberate intention of the Legislature, and I have ventured respectfully to correct it by introducing the two words referred to.

Clause 4. The words " November or " are new. The prothonotary states that the fixing by statute of the annual election of the barrister's board so late as December has been found extremely inconvenient to the public and the profession and the offices, as certain things cannot be done till after the election has taken place. So trifling a detail as the fixing of a date for such a purpose seems rather a matter for a rule of court or a regulation than the heavy machinery of a statute. I have ventured to put in the words referred to.

Clauses 11 and 14. The use of the inaccurate word " disbarred " in sec. 3 of the Act 55 Vic. No. 31 has created a great difficulty, and in the cases of *ex parte Grant* and *ex parte Mugliston* (reported in 9 W.N. 77 and 12 W.N. 120 respectively) the Court came to different conclusions as to its powers. Some words have therefore been introduced to remove all doubt, and make what was the evident intention quite clear. The words " from the date of his admission in New South Wales " have been added after the words " any solicitor (or barrister) of five years' standing," and the expressions " removed " and " removed from the roll of barristers " have been substituted for " struck off " and " disbarred " respectively.

Clause 13. The wording is somewhat altered from that of sec. 1 of 20 Vic. No. 14 because the term of five years is not required by statute but only by rule of court, and also generally to improve the reading of the clause.

8. 1.

Clause 17. Some changes have been made here. "Court or a judge" has been substituted for "the judges or any one of them." "And such other one or two officers," &c., has been put for "or such," &c., because the officers are to assist the master, and they cannot assist one whom they have entirely ousted. The phrase "Court or a judge" has been put for "judges." The section here dealt with is most confused, and the best sense possible has been made of it.

Clause 20. The word "prothonotary" was originally "registrar." The two offices are united, and the title "registrar" is now never applied to the prothonotary.

Clause 16. The phrase "in such manner and form as the judges of the Supreme Court shall direct," being vague and unsatisfactory, has been changed to "in the prescribed manner and form," the word "prescribed" being defined in clause 3 to mean prescribed by rules of court.

Clause 21 (2). One of the difficulties of this consolidation has been to deal with the phrase, incessantly repeated in the Act 11 Vic. No. 33, "or executor, administrator, or assignee of such attorney or trustee of his estate." Curiously enough, however, in the proviso to sec. 4 of this Act, these words were omitted when they should have appeared. The omission was clearly an oversight, and the clause has been so drafted as to correct it.

Clause 21 (3). This is new, and merely facilitates the drafting of the subsequent clauses.

In this clause 21, and in one or two other places, it has been found necessary to insert the expression "executor, administrator, or assignee, &c.," which as a rule has been eliminated from the body of the bill by the definition of the word "solicitor" in the interpretation clause.

Clause 22 (2). The registrar in bankruptcy has here been made the taxing officer. The Act 11 Vic. No. 33, sec. 1, made the chief commissioner of insolvent estates the taxing officer. By sec. 127 of the Bankruptcy Act "judge in bankruptcy" was substituted for "chief commissioner," &c. This would make the judge the taxing officer, and in certain ways subordinate to the prothonotary. The judge, of course, never does tax, but the registrar does, and this clause now follows the practice. Divorce and Probate are new jurisdictions since the 11 Vic. No. 33. Taxing in these jurisdictions has in fact been done by the registrars, who are now recognised.

Clause 22 (3). This also embodies the practice which has grown up of necessity, and makes the procedure uniform in all the Courts.

Clause 23. "Shall thereupon" has been altered to "thereupon shall" to agree with the whole of the rest of the Act. The expression here was apparently a slip.

Clause 26. "Taxation" has been put for "reference." The words appointment and reference are loosely used throughout the original Act to mean sometimes the order of reference, sometimes the granting of the appointment, sometimes the actual taxation. In this Bill the word "taxation" has been introduced where taxation was meant and "appointment" is used to mean an appointment for taxation, and "reference" is used to mean a reference by a judge.

Clause 28 (2). The draftsman of the original section apparently did not notice that there is no "order" for appointment, and it has therefore been necessary somewhat to alter the wording, but without changing the meaning.

Clause 29. In the Imperial Act this section had a definite meaning (see Chitty's Practice, p. 107), in our Act it is hard to say exactly what it means, but I have been obliged to repeat it without any attempt at alteration.

Clause 37. The original section said nothing about "appointments." It has always been treated as including them, and they are now included.

Clause 38. This has had to remain as it is, notwithstanding that it is rather uncertain in whose name an application should be made when the solicitor is dead.

Clause 39 (2). The words "Court or" at the end of this subsection were omitted, evidently by inadvertence, in the original section.

Clause 40. Is far from satisfactory, but has been left untouched.

The wording of the principal Acts here consolidated has been very troublesome and many changes have been made for the sake of clearness, but without altering the sense.

Except in the particulars above set out I certify that this Bill solely consolidates and in no way alters, adds to, or amends the law as contained in the Acts thereby consolidated.

CHAS. G. HEYDON,

Commissioner for the Consolidation of the Statute Law.

S. 1.

TABLE

Showing how the sections of Acts consolidated have been dealt with.

Section of Repealed Acts.	Section of Consolidated Act.	Remarks.
11 Vic. No. 33, s. 1...	21-24 ..	The provisions in clause 22 (2) as to matrimonial and probate business are new. By the Bankruptcy Act the Judge in Bankruptcy is substituted for the Chief Commissioner in Insolvency. In this Bill the registrar has been substituted for the Judge. Clause 22 (3) is new. The concluding words of this section as to costs of taxation have been omitted as unnecessary. See clause 28. As to the executor, administrator, or assignee of a solicitor, and the trustee of his estate, see clause 3.
2..	25, 26	
3..	27-29	No order is required for an appointment to tax. An obvious mistake in this respect has been corrected in clause 28 (2).
4..	21 (2), 30	
5..	31	
6..	32	
7..	33	
8..	34	
9..	35	
10..	36	
11..	37 ..	Amended in conformity with clause 22 (2). New as applied to appointments.
12..	38, 39	The words "Court or" near the end of clause 39 supply an obvious omission.
13..	40	
14..	16-20	"Prothonotary" substituted for "registrar" in clause 20, there being now no registrar of the Court.
15..	3	Provisions relating to Port Phillip omitted as obsolete.
11 Vic. No. 57, s. 1...	4, 6, 7	Proviso spent "November or" in clause. 4 is an amendment.
2..	9	
3..	10	
4..	5	
20 Vic. No. 14, s. 1...	3, 8	"University graduate" (clause 3). Graduates of Sydney University in law and medicine are included.
2..	13	Reference as to the term of 5 years omitted, as it is a term prescribed by rule only.
22 Vic. No. 23, s. 1...	3, 8, 13	
39 Vic. No. 32, s. 1...	6, 8	
2..	6	
46 Vic. No. 2, s. 1	12	
55 Vic. No. 31, s. 1...	.....	Interpretation.
2..	15	
3..	11, 14	The difficulty occasioned by the use of the inaccurate word "disbarred" has been removed by some verbal changes.
4..	.....	Short title.

ACT No. XXII, 1898.

§. 1.

An Act to consolidate the enactments relating to Legal Practitioners. [Assented to, 27th July, 1898.]

BE it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and Legislative Assembly of New South Wales in Parliament assembled, and by the authority of the same, as follows :—

PART I.

PRELIMINARY.

1. This Act may be cited as the "Legal Practitioners Act, 1898," and is divided into Parts, as follows :—

PART I.—PRELIMINARY—ss. 1-3.

PART II.—BARRISTERS—ss. 4-12.

PART III.—SOLICITORS—ss. 13-15.

PART IV.—CONVEYANCERS—ss. 16-20.

PART V.—BILLS OF COSTS—ss. 21-39.

PART VI.—UNQUALIFIED PRACTITIONERS—s. 40.

2. (1) The Acts mentioned in the Schedule to this Act are, to the extent therein expressed, hereby repealed. Repeal. Schedule.

(2) All persons appointed or elected under the Acts hereby repealed and holding office at the time of the passing of this Act shall be deemed to have been appointed or elected hereunder. Officers under Acts hereby repealed.

(3) All rules made under the authority of any Act hereby repealed and being in force at the time of the passing of this Act shall be deemed to have been made under the authority of this Act. Rules under Acts hereby repealed.

3. In this Act, unless the context or subject-matter otherwise indicates or requires— Interpretation.

"Barrister" means a barrister-at-law admitted by the Court.

"Court" means the Supreme Court.

"Judge" means a Judge of the Court.

"Prescribed" means prescribed by rules of Court.

"Solicitor" means an attorney, solicitor, and proctor of the Court, and in Part V of the Act includes the executor, administrator, and assignee of such solicitor and the trustee of his estate.

"University graduate" means a person who has taken any degree in arts, or in law, or in medicine, granted after examination— 20 Vic. No. 14, s. 1.
22 Vic. No. 23, s. 1.

(a) in the University of Sydney or of Oxford or of Cambridge; or

(b) in any university granting degrees by virtue of any Imperial Act or Royal Charter, or any Colonial Act assented to by Her Majesty or any of Her Majesty's predecessors.

S. 4.

PART II.

BARRISTERS.

Admission
Board.11 Vic. No. 57,
s. 1.

4. The Judges, the Attorney General, and two barristers to be annually elected by the practising barristers in the month of November or December for the year then ensuing shall form a Board for the approval of properly qualified persons to be barristers.

General power to admit barristers is conferred on the Court by clause 10 of the Charter of Justice (*post*).

Rules regulating their admission are made by the Board above-mentioned, and published annually in the Law Almanac for the year.

Meetings.

Ibid. s. 4.

5. (1) No meeting of the Board nor any meeting of the bar for the election of such two members of the Board shall be held without notice in writing previously given by the Attorney General to each member of the Board (or to each practising barrister as the case may be) three days at the least before the day of meeting, specifying therein the time and place of meeting.

(2) Every such notice may be given by leaving the same at the party's chambers or usual residence.

(3) The acts and resolutions of the majority of the Board or barristers present at any meeting so called shall have effect and be binding as the acts and resolutions of the whole body.

Rules for
examination.*Ibid.* s. 1.39 Vic. No. 32,
ss. 1, 2.

6. The Board shall make and promulgate rules for the examination of candidates for admission as barristers in—

(a) Latin classics ;

(b) Greek classics, or logic, or French language and literature ;

(c) mathematics ;

(d) law ;

and in such other branches of knowledge as the Board thinks fit.

Examiners.

11 Vic. No. 37,
s. 1.

7. The Board may depute the examination of candidates to such persons as they consider competent to examine such candidates, subject to the payment of such reasonable fees to the examiners as the Board shall order to be paid by such candidates.

Exemption of
university
graduates and
certain under-
graduates.20 Vic. No. 14,
s. 1.22 Vic. No. 23,
s. 1.39 Vic. No. 32,
s. 1.

8. (1) No university graduate shall be required to pass any examination under this Part of this Act other than an examination in law.

(2) No candidate who has passed two annual examinations in the University of Sydney shall be required to pass an examination in any of the subjects mentioned in subsections (a), (b), and (c) of section six.

Character of
candidates.11 Vic. No. 57,
s. 2.

9. No candidate, however qualified in other respects, shall be admitted as a barrister unless the Board is satisfied that he is a person of good fame and character :

Provided that nothing herein contained shall be construed to apply to the admission of barristers of England or Ireland or advocates of Scotland.

10. Every candidate whom the Board shall approve as a fit and proper person to be made a barrister shall be admitted as a barrister by the Court on any day appointed for that purpose. **S. 10.**

On application the Court admitted as a barrister a member of the English bar, though he did not produce the usual certificate, the Attorney-General, who moved his admission, having stated that he had satisfied himself on the point : *Ex parte Fairfax*, (1894) 11 W.N. 23. See sec. 9 (*supra*). Admission of approved candidates. 11 Vic. No. 57, s. 3.

11. Any solicitor of five years standing from the date of his admission in New South Wales, upon having his name on his own application removed from the roll of solicitors in the Court, shall be entitled, without examination, to be admitted as a barrister. Solicitors of five years standing. 55 Vic. No. 31 s. 3.

See Commissioner's Memorandum (*ante*).

In *In re Mugliston*, (1896) 17 N.S.W.R. 175 ; 12 W.N. 120, an English barrister of more than five years standing practised for some years as an attorney and barrister in Tasmania, and was then admitted to the Bar of New South Wales.

Solicitor of five years' standing.—In *Ex parte Conroy*, (1898) 15 W.N. 106, the applicant had been a barrister for five years, and then been admitted as a solicitor. Within five years of his admission as solicitor, he applied to be again admitted to the Bar, first having his name removed from the roll of solicitors. The Court granted the application on his original qualification.

12. Any person duly admitted to practise as a barrister in the Supreme Court of Victoria or of Queensland shall be entitled to be admitted as a barrister upon such terms and conditions and payment of such fees as may be prescribed. Barristers of Victoria or Queensland. 46 Vic. No. 2 s. 1.

PART III. SOLICITORS.

13. No university graduate who is desirous of being admitted as a solicitor shall be required to pass any examination, other than in law, either before or after entering into articles of clerkship, or to serve under such articles for more than three years. Exemption of university graduates. 20 Vic. No. 14, s. 2. 22 Vic. No. 23, s. 1.

General power to admit solicitors is given to the Court by clause 10 of the Charter of Justice (*post*), in accordance with rules to be made by the Court. See RR. 427, *et seq.*, (*post*).

14. Any barrister of five years standing from the date of his admission in New South Wales, upon having his name on his own application removed from the roll of barristers in the Court, shall be entitled, without examination, to be admitted as a solicitor. Barristers of five years standing. 55 Vic. No. 31, s. 3.

See Commissioners' Memorandum (*ante*).

The Court refused to admit as a solicitor a barrister of the Court of five years standing who did not reside in New South Wales : *Ex parte Edmondson*, (1899) 15 W.N. 287 ; holding that although this section exempts the applicant from examination, the Court has still to see that only fit and proper persons are admitted ; and a person residing out of the jurisdiction of the Court, is not such a person.

See *Ex parte Grant*, (1892) 9 W.N. 77, and *In re Mugliston*, (1896) 17 N.S.W.R. 175 ; 12 W.N. 120, decided on the terms of the old section.

15. Every solicitor shall be competent to appear and shall have the right of audience in all Courts in New South Wales in all matters and proceedings in which he acts as solicitor. Right of audience. Ibid. s. 2.

Two attorneys may appear for and defend a prisoner at Quarter Sessions : *R. v. Matthews*, (1887) 8 N.S.W.R. 45.

S. 16.

PART IV.

CONVEYANCERS.

Notice of
intention to
apply.

11 Vic. No. 33,
s. 14.

16. Every person not being a barrister or solicitor who is desirous of practising as a conveyancer shall, one month at least before making application as hereinafter mentioned, give notice in the prescribed manner and form of his intention to apply for a certificate to practise as a conveyancer.

Order for
examination.
Ibid.

17. Upon the application of any such person, having given such notice, the Court or a Judge shall direct that the applicant be examined at the earliest convenient time by the master in equity (or by the said master and such other one or two officers of the Court as the Court or Judge may appoint to assist him) touching the applicant's skill and knowledge in conveyancing as well as his character for integrity.

Examination.
Ibid.

18. The said master and other officers may put such questions to the applicant in respect to the matters aforesaid, and may require such proof of his character as they think fit.

Certificate.
Ibid.

19. If the applicant is considered of competent ability and knowledge and a fit and proper person to practise as a conveyancer, the said master shall grant to him a certificate authorising him to draw, fill up, and prepare any conveyance, will, deed, bond, lease, or agreement for a lease, or other contract whatsoever of or relating to any estate or property, whether real or personal.

The applicant shall have the power of appeal to the Court in case of refusal of such certificate by the master.

Enrolment.
Ibid.

20. Such certificate shall be enrolled in the office of the prothonotary of the Court, whereupon the applicant shall be deemed a certificated conveyancer, and entitled to practise as such.

These sections make a conveyancer an officer of the Court, so as to be dealt with as such in case of any misconduct in his profession: *In re Lewis*, (1887) 8 N.S.W.R. 181; 3 W.N. 139.

PART V.

BILLS OF COSTS.

Delivery of
signed bill
before action.
Ibid. s. 1.

21. (1) No solicitor, or executor, administrator, or assignee or any solicitor, or trustee of his estate, shall commence or maintain any action or suit for the recovery of any fees, charges, or disbursements for any business done by such solicitor until the expiration of one month after a bill of such fees, charges, and disbursements, subscribed in his proper handwriting—

- (a) by such solicitor, or
- (b) in the case of partnership, by any of the partners, either with his own name or with the name and style of such partnership, or
- (c) by the executor, administrator, or assignee of such solicitor, or the trustee of his estate,

has been delivered by him unto the party to be charged therewith, or sent by post to, or left for such party at his counting-house, office of business, dwelling-house, or last-known place of abode. **S. 21.**

(2) Provided always that a Judge may authorise the commencement of such action or suit against such party, although one month has not expired as aforesaid, on proof to the satisfaction of the Judge that there is probable cause for believing that such party is about to quit New South Wales. 11 Vic. No. 33
s. 4.

(3) The word "bill" when hereinafter used means a bill of such fees, charges, and disbursements.

Any business.—An attorney cannot recover in respect of services rendered as an attorney in criminal matters at a police court without delivering a bill under this section : *Moffat v. White*, (1862) 1 S.C.R. 141. And see *Chitty's Archbold*, 110, 111.

One month.—"Month" means calendar month (Interpretation Act, 1897). The month runs notwithstanding vacation : *Ex parte McIntosh*, (1865) 4 S.C.R. 191.

A bill, etc.—See generally *Chitty's Archbold*, 111, 112. An account headed "Memorandum of costs and disbursements," showing in two columns without detailed items the gross amounts out of pocket and the profit costs in respect of each matter in which the solicitor had been employed is (*semble*) a taxable bill : *Langdon v. Pearce*, (1899) 20 N.S.W.R. 329 ; 16 W.N. 66.

A note in reference to the profit costs (which amounted to £58 5s. 3d.) "say thirty guineas," is a concession offered for prompt payment, and the attorney, if the bill is not paid can sue for the whole amount subject to taxation : *ibid.* A signed itemized bill delivered unconditionally is the solicitor's bill, which should be taxed although the solicitor desires to deliver a subsequent amended bill : *In re Jhonson*, (1890) 6 W.N. 126. But where the first bill was unsigned, see *Re Macnamara's Costs*, (1884) 5 N.S.W.R. 342. But where a signed bill for a lump sum is sent in the solicitor may send in a second itemized bill for a larger amount and have that bill taxed without reference to the first bill : *Ex parte Steel*, (1898) 15 W.N. 96, where *Cohen, J.*, reviews the cases referring to *Re Macnamara's Costs*, (*supra*) ; *In re Robb and Beaumont*, (1882) T.T.R. 75, and *In re Collins and Fox*, (1895) 11 W.N. 93 ; also to *In re Creagh and Williams*, (1896) 17 N.S.W.R. Eq. 6 ; and also referring to the English cases under which, apparently, a second itemized bill may be brought in but not to a larger amount than the first bill.

A plea that no signed bill has been delivered is a plea to the merits : *Nicholson v. Perrott*, (1901) 18 W.N. 113.

Delivered.—See *Chitty's Archbold*, 113.

The word "bill."—Sub-section (3) is new, but seems to be in accordance with *In re Curtiss and Barry*, (1889) 6 W.N. 72, and in *Re Meyer*, (1894) 10 W.N. 137, in which cases it was held that an unsigned bill is a taxable bill.

22. (1) Upon the application of the party chargeable with a bill within such month, an appointment for taxation of the same may be obtained as of course, and without order of a Judge, from the taxing officer. Appointment
for taxation.
Ibid. s. 1.

(2) The taxing officer under this Act shall be— Taxing officers.
Ibid

- (a) the master in equity in case the whole of the business contained in such bill has been transacted in the Court in its equitable jurisdiction, or in any matter of lunacy, or relates to conveyancing business ;
- (b) the registrar in bankruptcy in case the whole of such business has been transacted in the Court in its bankruptcy jurisdiction ;
- (c) the registrar in divorce in case the whole of such business has been transacted in the Court in its matrimonial causes jurisdiction ;

S. 22.

- (d) the registrar of probates in case the whole of such business has been transacted in the Court in its probate jurisdiction ;
- (e) the prothonotary of the Court in every other case, including criminal business, and though the business or part of the business contained in such bill has not been transacted in the Court.

Delegation by
taxing officers.

(3) Provided that any power or duty conferred or imposed upon any taxing officer by this Act may in any case be delegated by him as follows, that is to say—

- (a) by the master in equity to the deputy registrar in equity ;
 - (b) by the registrar in bankruptcy to the chief clerk in bankruptcy ;
 - (c) by the registrar in divorce to the deputy registrar in divorce ;
 - (d) by the registrar of probates to the deputy registrar of probates ;
 - (e) by the prothonotary to the chief clerk of the Court ;
- and the officer to whom such power or duty is delegated shall be the taxing officer in such case.

In the case of *Dwyer v. Herman*, (1881) 2 N.S.W.R. 280, the Court held that where a signed bill has been delivered, and no attempt to tax it made within a month, then when an action is brought on it, it must be taken for granted that the parties have admitted the charges to be reasonable : *sed q. see Creagh and another v. Hurley*, (1889) 20 N.S.W.R. 287 ; 16 W.N. 48.

Taxation.

11 Vic. No. 33,
s. 1.

23. Such bill and the demand of the solicitor thereupon shall be taxed and settled by the taxing officer without any money being brought into Court.

“**Shall thereupon.**”—The words of the old Act are replaced by “thereupon shall.”—(*Commissioner's Note.*)

Action
restrained
pending
taxation.
Ibid.

24. The Court or a Judge shall restrain the solicitor from commencing any action or suit touching such demand pending such taxation.

Reference to
taxation after
one month.
Ibid. s. 2.

25. (1) In case no such application be made within such month as aforesaid, the Court or a Judge may upon the application either—

- (a) of the solicitor whose bill has been so delivered, sent, or left as aforesaid ; or

- (b) of the party chargeable with such bill,
with such directions and subject to such conditions as the Court or Judge thinks fit, refer the bill and the demand of the solicitor thereupon to be settled and taxed by the taxing officer, and (in case such reference is made on the application of the party so chargeable) without any money being brought into Court.

(2) Provided that no such reference shall be made on the application of the party so chargeable—

- (a) after a verdict has been obtained, judgment signed, or writ of inquiry executed in any action for the recovery of the demand of such solicitor ; or
- (b) after the expiration of twelve months after the bill has been delivered, sent, or left as aforesaid,

Taxation after
verdict, &c., or
after twelve
months.

except under special circumstances to be proved to the satisfaction of the Court or Judge.

See R. 412 (*post*).

Bill.—Includes unsigned bill : see note to s. 21.

Party chargeable.—The personal representative of the party may also apply ; and his official assignee : Chitty's Archbold, 118.

As to taxation by third parties, see s. 32 (*post*).

Conditions.—A special condition was asked for (security for costs) but refused : *Ex parte Kirchner*, (1899) 16 W.N. 4.

Costs of the application : see s. 28 (*post*).

After verdict.—In an action on a bill of costs a verdict was taken for the plaintiff and entered "verdict for plaintiff for full amount claimed subject to reduction by the prothonotary on taxation, and if whole amount taxed off, then verdict for defendant." The defendant took no steps to have the bill taxed and plaintiff after ten days signed judgment. Defendant about seven weeks after verdict got an order for taxation signed by the Judge who heard the case, and dated on the day of the verdict. On cross applications the Judge set aside this order, and refused to set aside the judgment : *Crick v. Thomson*, (1898) 10 W.N. 115.

Special circumstances.—See *Miller v. Hennessey*, (1866) 4 S.C.R. 319 ; *Ex parte Logan*, (1867) 7 S.C.R. 11 ; *In re Curtiss and Barry*, (1889) 6 W.N. 72.

26. The Court or a Judge may restrain the solicitor from commencing or prosecuting any action or suit touching such demand, pending such taxation, upon such terms as the Court or Judge thinks fit.

Action restrained pending reference.
11 Vic. No. 38, s. 2.

"Taxation" has been substituted for "reference" in the original Act. The words appointment and reference were loosely used in the original Act to mean sometimes the order of reference, some times the granting of the appointment, sometimes the actual taxation. In this bill the word "taxation" has been introduced where taxation was meant, and "appointment" is used to mean an appointment for taxation, and "reference" is used to mean a reference by a Judge. —(*Commissioner's Note*.)

The master having taxed a conveyancing bill down to £1 12s. 10d. (on the ground that there was a special agreement as to charges) the solicitor began an action for £65, the full amount of his bill ; the Court stayed the action, holding that his proper course was to apply for a review : *Ex parte Harper*, *In re McCulloch*, (1887) 8 N.S. W.R. 167 ; 3 W.N. 137.

27. Upon every such appointment or reference if either the solicitor whose bill has been delivered, sent, or left, or the party chargeable with such bill, having due notice, refuses or neglects to attend the taxation, the taxing officer may proceed to tax and settle the bill and demand *ex parte*.

Taxation in absence of solicitor or party chargeable.
Ibid. s. 3.

28. (1) In case any such appointment or reference is obtained or made—

Costs of taxation:
Ibid.

(a) upon the application of the party so chargeable ; or

(b) upon the application of the solicitor, and the party so chargeable attends upon the taxation,

the costs of the taxation shall, except as hereinafter provided, be paid according to the event of such taxation, that is to say—

(c) by the solicitor, if the bill when taxed be less by a sixth part than the bill delivered, sent, or left, and

(d) by the party so chargeable, if the bill when taxed be not less by a sixth part than the bill delivered, sent, or left.

(2) The taxing officer shall tax the costs of the taxation, and certify what upon such taxation is found to be due to or from the solicitor in respect of such bill or demand, and of the costs of the taxation, if payable.

Taxation and certificate.

S. 28.

Special certificate by taxing officer.

Special directions.

(3) Provided that such officer may in any case certify specially any circumstances relating to such bill or taxation, and the Court or a Judge may thereupon make such order as the Court or Judge thinks fit respecting the payment of the costs of the taxation.

(4) Provided also that where any such reference is made the Court or Judge may give any special directions relative to the costs of the taxation.

(5) In this section the expression "costs of the taxation" includes the costs of the appointment or reference.

Costs of the taxation.—Costs of preparing the bill are not allowed: *Ex parte McCook*, (1887) 3 W.N. 86. Costs of the order of reference are included in the costs of taxation: sub-sec. 5 (*supra*); *Re Cahill's Costs*, (1886) 3 W.N. 33.

An action was brought to recover costs for conveyancing work more than twelve months after the bill had been delivered; a verdict was taken for the plaintiffs, subject to taxation, and an order to tax made; on taxation more than one sixth was taxed off, but the master (the taxing officer) refused to tax defendant's costs of taxation; on application to compel him to do so, *held*, that the order to tax was made under the general powers of the Court (no special circumstances existing) and that defendant was not entitled to the costs: *Creagh and another v. Hurley*, (1899) 20 N.S.W.R. 287; 16 W.N. 48.

Certify specially.—In *Vaughan v. Chenhall*, (1898) 19 N.S.W.R. 123; 14 W.N. 163, the taxing officer certified that the solicitor had a lien on certain moneys paid into Court under a garnishee order.

Order for delivery of bill or for delivery up of deeds, &c.
11 Vic. No. 33,
s. 3.

29. The Court or a Judge may in any case make such order for the delivery of such bill as aforesaid by any solicitor, or the executor, administrator, or assignee of any solicitor, or trustee of his estate, and for the delivery up of deeds, documents, or papers in his custody, possession, or power, or otherwise touching the same in the same manner as was done as regarded such solicitor by such Court or Judge before the passing of the Act eleventh Victoria number thirty-three, where any such business had been transacted in the Court.

As to compelling delivery of a bill, see generally Chitty's Archbold, 115.

After an attorney had by arrangement with his client deducted his costs out of a verdict obtained by him on behalf of his client, the client demanded a detailed bill. The attorney refused to give it unless paid his costs of preparing such bill. On summons to compel delivery of the bill the order was made with costs: *In re McCook*, (1887) 3 W.N. 86. But *In re Mackenzie*, (1890) 6 W.N. 117, the Judge while ordering delivery of a bill, which had been paid, made it a condition that the applicant should pay the costs of preparing the bill.

Deeds, documents, etc.—An attorney will not be ordered to deliver up documents on which he has a lien for costs, until his costs are paid: *In re Castle*, (1867) 6 S.C.R. 195.

And where an attorney's bill of costs was disputed—an application to compel him to deliver up to his client the papers connected with the case, and on which he relied to establish his bill on taxation was refused, even though the attorney retained in his hands sufficient money to meet the bill as delivered: *Ex parte Kerry*, (1901) 18 W.N. 236.

Evidence of delivery of bill.
Ibid. s. 4:

30. It shall not in any case be necessary in the first instance for a solicitor in proving a compliance with this Act to prove the contents of the bill he may have delivered, sent, or left, but it shall be sufficient to prove that a bill subscribed in the manner aforesaid was delivered, sent, or left in manner aforesaid, but nevertheless it shall be competent for the other party to show that the bill so delivered, sent, or left was not such a bill as constituted a bona fide compliance with this Act.

31. In taxing any bill for preparing or drawing any deed, contract, case, or other document, the taxing officer in estimating the proper sum to be charged for such transaction shall consider the skill and labour properly employed, and the expense and responsibility incurred in the preparation thereof.

S. 31.

Costs allowed according to skill and responsibility.

11 Vic. No. 33, s. 5.

32. (1) Where any person not the party chargeable with a bill within the meaning of the provisions hereinbefore contained is liable to pay or has paid such bill either to the solicitor or to the party chargeable with such bill, such person, his executor, administrator, or assignee, or the trustee of his estate, may make such application for a reference for the taxation and settlement of such bill as the party chargeable therewith might himself make, and the same reference and order shall be made thereupon, and the same course pursued in all respects as if such application were made by the party so chargeable.

Taxation on application of third parties.

Ibid. s. 6.

(2) Provided always that in case such application is made when under the provisions herein contained a reference is not authorised to be made except under special circumstances, the Court or Judge to whom such application is made may take into consideration any additional special circumstances applicable to the person making such application, although such circumstances might not be applicable to the party so chargeable if he were the party making the application.

Special circumstances.

Any person not the party chargeable . . . may make such application for reference, etc.—“In an application made under this provision by a third party, the attorney must be made a party: *Loseby v. Bennett*, (1887) 3 W.N. 136. As to the right of one of several parties chargeable, see *In re J. F. Fitzhardinge*, (1887) 3 W.N. 57.

A party to a reference having taken up an award and paid the umpire's costs (which as it turned out, the award directed him to pay) was held entitled to an order for taxation of the umpire's solicitor's costs: *In re Collyer-Bristow & Co.*, (1901) 2 K.B. 839.

Where defendant, in settlement of an action, agreed to pay and paid a lump sum for plaintiff's costs, but plaintiff agreed that his solicitor should supply a bill for taxation, defendant applied for an order directing plaintiff's solicitor to deliver the bill to defendant, and *Cohen, J.*, made the order, but on appeal, the Court rescinded the order, holding that defendant was not entitled to the order under this section: *In re Rolin and Gilder's Costs*, (1896) 17 N.S.W.R. 204; 13 W.N. 65.

33. (1) In any case in which a trustee, executor, or administrator has become chargeable with a bill, a Judge may, in his discretion, upon the application of a party interested in the property out of which such trustee, executor, or administrator has paid or is entitled to pay such bill, refer the same and the demand of the solicitor thereupon to be taxed and settled by the taxing officer, with such directions, and subject to such conditions as the Judge thinks fit, for the payment of what may be found due, and of the costs of the taxation and reference to or by the solicitor by or to the party making the application, having regard to the provisions of this Act relative to applications for the like purpose by the party chargeable with such bill, so far as the same are applicable.

Taxation of bills chargeable to trustees, &c., on application of parties interested.

Ibid. s. 7.

(2) In exercising such discretion the Judge may take into consideration the extent and nature of the interest of the party making the application.

S 33.

(3) Provided always that where any money shall be so directed to be paid by the solicitor, the Judge may order the same or any part thereof to be paid to the trustee, executor, or administrator so chargeable instead of being paid to the party making the application ; and when such party shall pay any money to the solicitor in respect of such bill, he shall have the same right to be paid by such trustee, executor, or administrator as the solicitor had.

Delivery of bill
to third parties.
11 Vic. No. 33,
s. 8.

34. For the purpose of any reference under either of the two last-preceding sections the Court or a Judge may order the solicitor to deliver to the party making the application a copy of such bill upon payment of the costs of such copy.

No retaxation
except under
special cir-
cumstances.
Ibid. s. 9:

35. (1) No bill which has been taxed and settled either under an appointment or reference shall be again referred, unless under special circumstances the Court or a Judge thinks fit to direct a retaxation.

Review of
taxation.

(2) Provided nevertheless that where a bill of costs has been taxed an order for review of the taxation may be made by the Court or a Judge after rule or summons to show cause, and the Court or Judge may thereupon direct the taxing officer to review and correct such taxation instantler.

Costs:

(3) The costs of the application shall be in all cases in the discretion of the Court or Judge.

(1) **No bill which has been taxed.**—*In re Creagh and Williams*, (1896) 12 W.N. 85, it was held that moderation of a bill by the Registrar of Probates on an application by the executors of an estate was not a taxation such as would disentitle the executor to have the same bill taxed on application in the usual way.

As to review see RR. 415, *et seq.* (post).

Taxation after
payment of
bill.
Ibid. s. 10.

36. The payment of a bill shall in no case preclude the Court or Judge from referring such bill for taxation if the special circumstances of the case, in the opinion of the Court or Judge, appear to require the same, upon such terms and conditions and subject to such directions as the Court or Judge thinks fit :

Provided always that the application for such reference be made within twelve months after payment.

In re Mackenzie, (1890) 6 W.N. 117, it was held that the Court has jurisdiction to order an attorney to deliver his bill of costs, although the bill has been paid and there is no dispute as to the amount, and no question of taxation.

Payment.—Retainer by a solicitor of money in his hands by agreement is not payment if no bill has been delivered : *Ex parte Kirchner*, (1899) 16 W.N. 4.

Prothonotary
may request
other taxing
officer to assist
in taxing bill.
Ibid. s. 11.

37. (1) In all cases in which an appointment or reference is obtained or made for the taxation and settlement of a bill by the prothonotary, he may request the master in equity, the registrar in bankruptcy, the registrar in divorce, or the registrar of probates to assist him in taxing and settling such bill or any part thereof.

(2) Such officer shall thereupon proceed to tax and settle the same, and shall have the same powers in respect thereof as upon a reference to him, and shall return the same with his opinion thereon to the prothonotary.

38. All applications made under this Act to refer a bill to be taxed and settled, or for the delivery of a bill, or for the delivery up of deeds, documents, and papers, shall be made in the matter of the solicitor.

S. 38.

Applications for taxation, &c., how made.
11 Vic. No. 33, s. 11.

39. (1) Upon the taxation or retaxation and settlement of any bill the certificate of the taxing officer shall (unless set aside or altered by order, decree, or rule of Court) be final and conclusive as to the amount thereof, and payment of the amount certified to be due and directed to be paid may be enforced according to the course and practice of the Court.

Certificate of taxing officer final.
Ibid.

(2) The Court or a Judge may order judgment to be entered up for such amount with costs, unless the retainer shall be disputed, or make such other order thereon as the Court or Judge thinks fit.

Judgment may be entered up.

See as to enforcing payment, Chitty's Archbold, 133.

PART VI.

UNQUALIFIED PRACTITIONERS.

40. Every person not being—

Certain persons only to draw conveyances, &c.
Ibid. s. 13.

- (a) a barrister, solicitor, or certificated conveyancer ; or
- (b) a person solely employed to engross any deed, instrument, or other proceeding not drawn or prepared by himself and for his own account ; or
- (c) a public officer drawing or preparing official instruments applicable to his office and in the course of his duty,

who shall, for or in expectation of any fee, gain, or reward, directly or indirectly, draw or prepare any conveyance or other deed or instrument in writing relating to any real estate or any proceedings in law or equity shall be deemed guilty of a contempt of Court, and shall and may be punished accordingly for every such offence upon the application of any person complaining thereof, or shall for every such offence forfeit and pay the sum of twenty pounds, to be sued for and recovered in a summary way before any court of summary jurisdiction.

Any conveyance or other deed or instrument, etc.—In *Ex parte Shoveller*, (1877) Knox. 174, it was held that drawing a petition for sequestration under the Insolvency Acts was not within the original section 13 of 11 Vic. No. 33.

But in *In re Jabes Ratcliffe*, (1892) 13 N.S.W.R. 194 ; 9 W.N. 37 ; it was held to be an offence within the section for an unauthorised person to draw a bankruptcy petition and statement of affairs in expectation of a fee.

Prepare.—Filling up a printed form of a writ of summons issued out of the Supreme Court is to “prepare” within the section : *Ex parte Simpson*, (1874) 12 S.C.R. 286.

For or in expectation of any fee, etc.—Where the fee is to be paid to another unqualified person, there is no offence within this section : *In re Crowley*, (1899) 20 N.S.W.R. 150 ; 15 W.N. 263.

Sch. 1.

SCHEDULE.

Reference to Act.	Title or short title.	Extent of Repeal.
11 Vic. No. 33	An Act to regulate the taxation of Attorneys' Bills of Costs and the practice of conveying.	The whole.
11 Vic. No. 57	An Act to regulate the admission in certain cases of barristers of the Supreme Court of New South Wales.	The whole.
20 Vic. No. 14	An Act to confer certain privileges on graduates of the University of Sydney.	The whole.
22 Vic. No. 23	An Act to extend to graduates of other universities certain privileges enjoyed by graduates of the University of Sydney.	The whole.
39 Vic. No. 32	An Act to amend an Act intituled an Act to regulate the admission in certain cases of barristers of the Supreme Court of New South Wales.	The whole.
46 Vic. No. 2	An Act to amend the Acts to regulate the admission in certain cases of barristers of the Supreme Court of New South Wales.	The whole.
55 Vic. No. 31	Legal Practitioners Act of 1892	The whole.

The whole of these Acts repealed by the Consolidating Act have been substantially re-enacted, the changes made having been made generally for the sake of greater clearness.—(*Commissioner's Note.*)

NEGOTIABLE INSTRUMENTS PROCEDURE ACT 1901.

TABLE

Showing how the sections of the Acts consolidated have been dealt with.

Section of Repealed Acts.	Section of Consolidated Act.	Remarks.
20 Vic. No. 30, s. 1	4, 5	This section is retained, as it includes instruments not within the scope of the Bills of Exchange Act, 1887, s. 70.
2	6	
3	7	
4	3	
20 Vic. No. 31, s. 53	8	
22 Vic. No. 3, s. 1	4	

ACT No. XLII., 1901.

An Act to consolidate enactments relating to remedies on bills of exchange and other negotiable instruments and orders for the payment of money. [Assented to, 7th November, 1901.]

BE it enacted by the King's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and Legislative Assembly of New South Wales in Parliament assembled, and by the authority of the same, as follows :—

1. This Act may be cited as the "Negotiable Instruments Short title. Procedure Act, 1901."

2. The Acts mentioned in the Schedule to this Act, to the extent therein expressed, are hereby repealed. Repeal. Schedule.

3. In this Act "Judge" means a Judge of the Court in which the action is brought. Interpretation.

4. No plea shall be admissible in any action to a count on any dishonoured bill, note, cheque, or other order for the payment of money without an affidavit—
 (a) of the truth of such plea ; or
 (b) of such facts as a Judge may under the circumstances deem sufficient in that behalf. Plea to be verified by affidavit.
 20 Vic. No. 30, s. 1.
 22 Vic No.. 3, s. 1.

S. 4.

Cf. R. 62 (post).

Without an affidavit.—Where in an action on a promissory note, the defendant filed a plea without an affidavit, and the plaintiff allowed the time to file a replication to elapse, and subsequently signed judgment treating the plea as a nullity, judgment was set aside on terms: *Wright v. Evans*, (1884) 1 W.N. 61.

In the case of the *Mont de Piété Co. v. Bennett*, (1890) 7 W.N. 45, it was decided that the Act 20 Vic. No. 30, which is consolidated by this Act, applies to actions in the District Court, and that a notice of special defence on equitable grounds to an action on a promissory note is a plea within the Act, and must be verified by affidavit when filed. And in that case *Winderley, J.*, said "I think it would be better that all actions on bills and notes should be brought in this (the Supreme) Court, and I always grant applications in such actions for certificates for costs."

A plea to an action on a promissory note verified by affidavit which merely states "the several statements set forth and contained in the plea are respectively true in substance and in fact according to the best of my knowledge" held not sufficient: *Commercial Bank of Australia, Ltd. v. McRae*, (1893) 10 W.N. 157; see also *Israel v. Airey*, (1895) 11 W.N. 152, where in an action on a promissory note and a cheque the defendant pleaded that he was not the maker of the note and that plaintiff was not the bearer of the cheque, and the affidavit simply stated that the pleas were true "to the best of his knowledge and belief"; this was held under the circumstances insufficient, and the pleas struck out.

In *Robert Reid & Co. v. McElhone*, (1894) 16 W.N. 85, the defendant in an action on a promissory note, wishing to withdraw a plea in abatement, which he could not support, was given leave to file a plea in bar without an affidavit setting out what the plea was or an affidavit of merits, on condition that there was an affidavit filed to the satisfaction of the Judge verifying the plea.

Of the truth of the plea.—The Court has no power to strike out a plea to a promissory note, solely on the ground that it is false, even though it be clearly shown to be false, and in direct contravention of an express agreement to pay the note: see *Bubb v. Little*, (1893) 9 W.N. 193; as this would be to take away the defendant's right to have the issue tried by a jury.

Walker v. Bailey, (1884) 1 W.N. 71; and *Hornsey v. Forster*, (1889) 5 W.N. 142, would not now be followed (see notes to s. 61, C.L.P. Act, ante).

But where a plea is plainly demurrable it may be struck out: *Hudson Bros. v. Greta Collieries*, (1894) 10 W.N. 120.

20 Vic. No. 30,
s. 1.

5. Any plea to any such count filed without such affidavit may be treated as a nullity.

Nullity.—If a plea be a nullity, the proper course is to sign judgment, and not to apply to the Court to strike it out: *Savage v. Sinclair*, (1897) 14 W.N. 114; see also *Wright v. Evans*, (1884) 1 W.N. 61.

Payment into
Court in lieu of
affidavit.

20 Vic. No. 30,
s. 2.

6. By leave of a Judge, instead of such affidavit, the defendant may pay into Court the amount of the plaintiff's claim or so much thereof as the Judge shall appoint.

By the Common Law Procedure Act, s. 80 (ante) money may be paid into Court in all actions (except malicious arrest or prosecution or debauching plaintiff's daughter or servant).

Further time to
plead may be
given.

Ibid. s. 3.

7. Upon application on behalf of any defendant who has been absent from his usual place of business or abode at the time of service of the summons, a Judge may give such further time for pleading as he deems reasonable.

See also RR. 56, 301 (post).

Actions on
lost instruments.
20 Vic. No. 31,
s. 53.

8. In any action in the Supreme Court founded upon a negotiable instrument, the Court or a Judge may order that the loss of such instrument shall not be set up, provided an indemnity is given to the satisfaction of the Court or Judge or the prothonotary against the claims of any other person upon such instrument.

Whether a "destroyed bill" is not a "lost" bill, *quære*: see *Ex parte William Walker*, (1892) 9 W.N. 1.

§. 3.

The order is made on the application of the plaintiff. In *Joseph v. Keys*, (1806) 12 W.N. 174, an application under s. 53 of the C.L.P. Act, 1857, (now this section) by the defendant in an action on a lost cheque, calling on the plaintiff to show cause why he should not give an indemnity approved of by the Prothonotary, was refused. The defendant's remedy is to plead the loss, and then he plaintiff may apply under the section.

The loss of a negotiable bill, given on account of a debt, is an answer to an action for the debt, as well as to one on the bill: *Croze v. Clay*, 9 Exch. 604; *aliter*, if the bill or note is not negotiable: *Wain v. Bailey*, 10 Ad. & E. 606. The defence can only be raised under a plea alleging the fact: *Charnley v. Grundy*, 14 C.B. 608. Such a plea may, therefore, now be struck out, on an indemnity being given, as to which *vide infra*.

But though the holder of a lost bill was in such case without remedy at law: *Hansard v. Robinson*, 7 B. & C. 90, in England, the Court of Chancery was in the habit of giving him relief, on his indemnifying the person liable on the bill against the claims of all other persons: *Terese v. Geray*, Finch, 301; *Walmsley v. Child*, 1 Ves. sen. 345. This, however, was only done in the case of foreign bills, and to extend the remedy to inland bills, the stat. 9 & 10 Will. 3, c. 17, s. 3, was passed: *Walmsley v. Child*, *supra*, which enacted that "in case any such inland bill or bills of exchange shall happen to be lost or miscarried within the time before limited for payment of the same, then the drawer of the said bill or bills is and shall be obliged to give another bill or bills of the same tenor with those first given, the person or persons to whom they are and shall be so delivered giving security, if demanded, to the said drawer, to indemnify him against all persons whatsoever, in case the said bill or bills of exchange so alleged to be lost or miscarried, shall be found again." "Such" includes all inland bills of exchange of the sum of £5 and upwards, payable at a certain number of days after the date thereof (sec. 1). The stat. 3 & 4 Ann. c. 9, having given the like remedies on promissory notes as were then in use on inland bills, may be considered as having extended this section to the makers of promissory notes of the like description: 2 Camp. 215, n. To obtain the benefit of this statute, it was, however, still necessary to proceed in equity, for it was held that the common law courts had no jurisdiction, because they were not able to enforce the giving of a new bill or qualified to judge of the sufficiency of an indemnity: *Davies v. Dodd* (in Equity), 4 Price, 176; *S.C.* (at law), 4 Taunt. 176; *Ex parte Greenway*, 6 Ves. 812.

As to the jurisdiction exercised by the courts of equity in the case of lost instruments, see *Byles on Bills*, 10th ed., pp. 375, 376, and cases there cited.

This present section obviates the difficulty raised by the construction put on the former statute by substituting the jurisdiction of a court of common law for that of a court of equity, and the court is to determine what is a proper indemnity according to the old practice in equity: *King v. Zimmerman*, L.R. 6 C.P. 466. Where the plaintiff has not offered an indemnity before action, the court will order the plea setting up the loss to be struck out only on the terms of the plaintiff paying the defendant's costs: *Ibid.*; *Redmayne v. Burton*, 2 L.T., N.S. 324, May, 1860, *per Willes*, J., at chambers.

The section will apply whether the loss has occurred before or after the commencement of the action.

Bank notes are negotiable instruments within the section: *M'Donnell v. Murray*, 9 Ir. Common Law Rep. 495. So also are half bank-notes: *Redmayne v. Burton*, *supra*.

See also *Conflans Stone Quarry Co. v. Parker*, L.R. 3 C.P. 1.

SCHEDULE.

Reference to Act.	Title or short title.	Extent of repeal.
20 Vic. No. 30	An Act to facilitate the remedies on bills of exchange and promissory notes.	The whole.
20 Vic. No. 31	The Common Law Procedure Act of 1857 ..	Section 53.
22 Vic. No. 3	An Act to extend the provisions of the twentieth Victoria number thirty.	The whole.

§. 1.

OATHS ACT 1900.

COMMISSIONER'S MEMORANDUM AND CERTIFICATE.

THIS Bill consolidates the whole or parts of ten statutes.

Clause 13. The sections mentioned in the margin to this clause followed one upon another, in different statutes, each ignoring its predecessors, and repeating substantially the same provisions with small differences. This clause amalgamates them without reproducing all the variations.

Clause 20 (2) (c). "Legislative Council," which was the only legislative body at the time the 9 Vic. No. 9 was passed, has been changed to "either House of Parliament."

I certify that, save as aforesaid, this Bill solely consolidates and in no way alters, adds to, or amends the law as contained in the Acts therein consolidated.

CHAS. G. HEYDON,

Commissioner for the Consolidation of the Statute Law

COMPARATIVE TABLE

Of Sections consolidated in clause 13.

20 Vic. No. 31, s. 10.*	40 Vic. No. 8, s. 3.	46 Vic. No. 17, s. 343.
If any person called as a witness	Whenever any person called to give evidence	Whenever any person called as a witness
or required or desired to make an affidavit or deposition	.....	.....
.....	.....	or having to make a statement in an information, complaint, or proceeding
.....	in any Court or before any Justice or other person authorised to administer an oath	in any Court or before any Justice
.....	whether in a civil or criminal proceeding	.....
shall refuse or be unwilling from alleged conscientious motives	shall object	objects
		

*22 Vic. No. 7, s. 1, and 22 Vic. No. 18, s. 48, extend the provisions of this section to all Courts.

20 Vic. No. 31, s. 10.	40 Vic. No. 8, s. 3.	46 Vic. No. 17, s. 343.
to be sworn	to take an oath	to take an oath
.....	or be reasonably objected to as incompetent to take an oath	or is reasonably objected to as incompetent to take an oath
.....	.....	or appears to the Court or Justice to be incompetent to take an oath
it shall be lawful for the Court or Judge or other presiding officer or person qualified to take affidavits or depositions upon being satisfied of the sincerity of such objection	.....	.....
to permit such person instead of being sworn to make his or her solemn affirmation in the words following, videlicet :—	such person shall make the following promise in lieu of such oath :—	he may make the following declaration instead of being sworn
“ I, A.B., do solemnly, sincerely and truly affirm and declare that the taking of any oath is according to my religious belief unlawful, and I do also solemnly, sincerely, and truly affirm and declare, &c.”	“ In the case in which I am now called as a witness I promise to tell the truth, the whole truth, and nothing but the truth ”	“ I solemnly declare that the evidence now about to be given (or the statement now about to be made) by me shall be the truth, the whole truth, and nothing but the truth ”
which solemn affirmation shall be of the same force and effect as if such person had taken an oath in the usual form.	.....	.....
.....	and any person, who having made such promise, shall wilfully and corruptly give any false evidence	and whosoever having made such declaration wilfully makes any false statement before such Court or Justice knowing the same to be false
.....	shall be deemed guilty of perjury	shall be deemed guilty of perjury if the statement, had it been on oath, would by law have been perjury
.....	.....	or may be found guilty if the evidence warrants such finding under the 292nd section of this Act.
.....	.....	and shall be liable to punishment accordingly.
and the like provisions shall apply also to every person required to be sworn as a juror.	.....	.....

§. 1.

TABLE

Showing how the sections of Acts consolidated have been dealt with.

Section of Repealed Acts.	Section of Consolidated Act.	Remarks.
9 Vic. No. 9, s. 1..	15, 18	
2	16	
3	17	
4	25	
5, 6	19	
7	20 ..	Sub-sec. (2) <i>e</i> is inserted in view of s. 21 (<i>g</i>) of the Interpretation Act.
8	22	
9	21, 25	
10	23	
11	24	
12	25	
20 Vic. No. 9, ss. 1, 2..	3	
3	.....	Superseded by 33 Vic. No. 14, s. 7.
4	6	
5	.....	Superseded by 33 Vic. No. 14, s. 11.
20 Vic. No. 31, s. 10..	13, 14	
22 Vic. No. 7, s. 1..	13	
22 Vic. No. 18, s. 48..	13	
33 Vic. No. 14, s. 1..	.....	Short title.
2-4	5	
5	5, 10	
6	7	
7	8, 9	
8	11	
9	3, 4 ..	17 Vic. No. 8 was repealed by 39 Vic. No. 19.
10	6	
11	12	
36 Vic. No. 31, ss. 1-3	.....	Re-enacts and confirms 33 Vic. No. 14.
37 Vic. No. 10, s. 1..	26, 27, 29	
2	28	
3	.....	Short title.
40 Vic. No. 8, s. 1..	.....	Repealed by Evidence Act.
2	.....	Repealed by Criminal Law Amendment Act
3	13	
4	.....	Short title.
46 Vic. No. 17, s. 295	21, 24	The unrepealed part dealt with in the Crimes Act.
339	14	
343	13	

ACT No. XX., 1900.

S. 1.

An Act to consolidate the enactments relating to oaths, affirmations, statutory declarations and affidavits.
[Assented to, 22nd September, 1900.]

BE it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and Legislative Assembly of New South Wales in Parliament assembled, and by the authority of the same, as follows :—

PART I.

PRELIMINARY.

1. This Act shall commence and take effect on the first day of January, one thousand nine hundred and one, and may be cited as the "Oaths Act, 1900," and is divided into parts as follows :—

PART I.—PRELIMINARY—ss. 1–2.

PART II.—OATHS—ss. 3–11.

PART III.—AFFIRMATIONS—ss. 12–14.

PART IV.—STATUTORY DECLARATIONS—ss. 15–25.

PART V.—AFFIDAVITS—ss. 26–29.

2. (1) The Acts mentioned in the First Schedule to this Act are, to the extent therein expressed, hereby repealed.

(2) All rules made and notifications published under the authority of any Act hereby repealed shall be deemed to have been made and published under the authority of this Act.

PART II.

OATHS.

3. (1) Where but for the passing of this Act or the Act twentieth Victoria number nine hereby repealed it would be necessary for any person—

- (a) to take the oaths commonly called the Oaths of Allegiance, Supremacy, and Abjuration, or any of them ; or
- (b) to take the oath prescribed by the Act commonly called the Roman Catholic Relief Act ; or
- (c) to make the declaration prescribed by the Imperial Act ninth George the Fourth, chapter seventeen,

it shall be sufficient for such person to take in lieu of the said several oaths and declaration the oath of allegiance in the form in the second Schedule hereto.

(2) Where by any law in force at the time of the passing of the said Act twentieth Victoria number nine the said several oaths or any of them might be taken before the Supreme Court or before a Judge, or were required to be taken in open Court, the oath prescribed by this Act may be taken and subscribed at

Commence-
ment, short
title, and
division.

Repeal.
Schedule 1.

Rules and
notifications
under repealed
Acts.

Oath of allegi-
ance substituted
for certain oath
and declaration.
Second
Schedule.

20 Vic. No. 9,
s. 1.

33 Vic. No. 14,
s. 9.

Before whom
the oath may
be taken.
20 Vic. No. 9,
s. 2.

- 8. 3.** any hour before the said Court or any Judge thereof, or before any Circuit Court or Court of Quarter Sessions, or any justice of the peace authorised by writ of *Dedimus potestatem* for that purpose.

Oath of
allegiance.
Second
Schedule.

33 Vic. No. 14,
s. 9.

4. (1) The oath of allegiance in the form in the Second Schedule hereto shall be substituted for the oaths prescribed by the thirty-third section of the Constitution Act.

(2) The said form in the said Second Schedule shall be the form of oath of allegiance taken by all other persons liable to take the said oath.

Interpretation:
Second to
Fifth Schedules

Ibid. s. 2.

Ibid. s. 3.

Ibid. s. 4.

Ibid. s. 5.

5. In this part of this Act—

“Oath of allegiance,” when hereinafter used, means an oath in the form in the Second Schedule hereto.

“Official oath” means an oath in the form in the Third Schedule hereto.

“Judicial oath” means an oath in the form in the Fourth Schedule hereto.

“Executive Councillor’s oath” means an oath in the form in the Fifth Schedule hereto.

Name of
Sovereign.

Ibid. s. 10.

20 Vic. No. 9,
s. 4.

6. The name of the Sovereign of the United Kingdom of Great Britain and Ireland shall be substituted in the said forms from time to time instead of the name of Her Majesty.

Public officers.

33 Vic. No. 14,
s. 6.

7. (1) The oath of allegiance and the official oath shall be tendered to and taken by all public officers required by order of the Governor to take the same.

(2) Such oaths shall be tendered to and taken by every such officer in manner in that behalf provided by the said order as soon as may be after the acceptance of office by him.

Judges and
justices of the
peace.

Ibid. s. 7.

8. (1) The oath of allegiance and the judicial oath shall be tendered to and taken by Judges of the Supreme Court and justices of the peace.

(2) Such oaths shall be tendered and taken in manner in which the oaths required to be taken by such persons before the passing of the Act thirty-third Victoria number fourteen would have been tendered and taken.

District Court
Judges and
other judicial
officers.

Ibid.

9. (1) The oath of allegiance and the judicial oath shall be tendered to and taken by District Court Judges and other judicial officers who are required by order of the Governor to take the same.

(2) Such oaths shall be tendered and taken in manner in that behalf provided by the said order.

Executive
councillors.

Ibid. s. 5.

10. (1) The oath of allegiance, the official oath, and the Executive Councillor’s oath shall be tendered to and taken by every member of the Executive Council before he enters upon the discharge of the duties of his office.

(2) Such oaths shall be tendered and taken in manner

in which the oaths required to be taken by such member before the passing of the Act thirty-third Victoria number fourteen on entering on his office would have been tendered and taken. **S. 10.**

11. (1) If any such officer as aforesaid liable to take any such oath declines or neglects when the same is duly tendered to take such oath, he shall, if he has already entered on his office, vacate the same, and if he has not entered on the same be disqualified from so doing. Penalty on not taking required oath. 33 Vic. No. 14, s. 8.

(2) But no person shall be compelled in respect of the same appointment to the same office to take such oath more than once.

PART III. AFFIRMATIONS.

12. When an oath is required to be taken under Part II of this Act, any person by law entitled to make a solemn affirmation or declaration instead of taking an oath may instead of taking such oath make a solemn affirmation in the form of such oath appointed by this Act, substituting the words "solemnly, sincerely, and truly declare and affirm" for the word "swear," and omitting the words "so help me God." Ibid. s. 11.

13. (1) Whenever any person—
- (a) called as a witness in any Court or before any justice or other person authorised to administer an oath, whether in a civil or criminal proceeding, or
 - (b) having to make a statement in any information, complaint, or proceeding in any Court or before any justice, or
 - (c) required or desired to make an affidavit or deposition, objects to take an oath, or is reasonably objected to as incompetent to take an oath, or appears to such Court or justice, or person so authorised, incompetent to take an oath, he may in lieu of such oath—
- (i) when so called as a witness make a declaration in the form in the Sixth Schedule hereto, or
 - (ii) in any other case make a solemn affirmation in the form in the Seventh Schedule hereto.

(2) Whosoever, having made such declaration or affirmation, wilfully gives any false evidence before such Court, justice, or person so authorised, or makes any false statement in such information, complaint, proceeding, affidavit, or deposition, knowing the same to be false, shall be deemed guilty of perjury if the evidence or statement, had it been on oath, would by law have been perjury. Declaration or affirmation in lieu of oath. Sixth and Seventh Schedules. 20 Vic. No. 31, s. 10. 22 Vic. No. 7, s. 1. 22 Vic. No. 18, s. 48. 40 Vic. No. 8, s. 3. 46 Vic. No. 17, s. 343. Penalty for wilfully false statements.

The determination of the tribunal before which the witness is tendered as to the witness's competency is final: *R. v. Moses*, Addison Digest 362; *R. v. Lewis*, (1877) Knox 8; see *Ex parte Boyle*, (1868) 7 S.C.R. 147; *R. v. Peters*, (1882) 3 N.S.W.R. 455.

This section does not enable children or other persons incompetent from want of understanding to give evidence: *R. v. Lewis*, *supra*.

8. 14.

Affirmations by
jurors in
certain cases.

20 Vic. No. 31,
s. 10.

46 Vic. No. 17,
s. 339.

14. (1) Whenever any juror objects to be sworn, the Court or Judge may permit him, instead of taking an oath, to make a solemn declaration, which shall be in the form of oath now in use, but substituting the words "So you solemnly declare and promise" for the words "So help you God."

(2) It shall not be necessary to allege, in any record or proceeding, that a particular juror made any such declaration, but it shall be sufficient in all cases to state that the jurors solemnly declared or were sworn.

PART IV.

STATUTORY DECLARATIONS.

Declarations
substituted for
oaths.

9 Vic. No. 9,
s. 1.

15. In any case where by any act relating to any of the public revenue or any public office or public department, or by any official regulation in any department, any oath or affidavit might, but for this Act, be required to be taken or made by any person—

(a) on the doing of any Act, matter, or thing, or

(b) for the purpose of verifying any book, account, entry, or return, or

(c) for any other purpose whatsoever,

the Governor may, by notification in the Gazette, substitute a declaration to the same effect as such oath or affidavit.

To be notified
in Gazette.

Ibid. s. 2.

16. From and after the expiration of twenty-one days next following the date of the Gazette wherein such notification is first published the provisions of this Part of this Act shall extend and apply to every case, office, or department specified in such notification.

Oaths not to be
taken there-
after.

Ibid. s. 3.

17. After the expiration of the said twenty-one days it shall not be lawful for any officer or other person to administer or cause to be administered any oath or to take or cause to be taken any affidavit in lieu of which such declaration has been substituted.

Declaration
how adminis-
tered.

Ibid. s. 1.

18. Every person who but for this Act might be required to take such oath or make such affidavit shall, in the presence of the officer or person empowered by the Act or regulation imposing the same to administer such oath or take such affidavit, make and subscribe such declaration; and such officer or person is hereby empowered and required to administer such declaration accordingly.

This Part not
to extend to
certain oaths.

Ibid. ss. 5, 6.

19. Nothing in this part of this Act shall extend or apply to—

(a) the oath of allegiance in any case in which the same is required to be taken by any person appointed to any office; or

(b) any oath or affidavit taken or made or required to be taken or made in any judicial proceeding in any Court of justice.

20. (1) It shall not be lawful for any justice of the peace or other person to administer or cause or allow to be received any oath or affidavit touching any matter or thing whereof such justice or other person has not jurisdiction or cognisance by some Act or Imperial Act in force at the time being.

S. 20.

Abolition of extra judicial oaths.
9 Vic. No. 9. s. 7.

(2) Provided that nothing in this section contained shall be construed to extend to—

- (a) any oath or affidavit before any justice of the peace in any matter or thing touching the preservation of the peace, or the prosecution, trial, or punishment of offences ; or
- (b) any inquiry held before any justice of the peace in the nature of coroners' inquests respecting sudden deaths ; or
- (c) any proceeding before either House of Parliament or a committee thereof ; or
- (d) any oath or affidavit required by the laws of any foreign or other country out of New South Wales to give validity to instruments in writing designed to be used in foreign or other countries respectively ; or
- (e) any declaration under this Part of this Act.

21. Any justice of the peace, notary public, or other officer by law authorised to administer an oath may take and receive the declaration of any person voluntarily making the same before him in the form or to the effect of the form in either the Eighth or the Ninth Schedule to this Act.

Declaration in cases not specifically provided for.
Eighth and Ninth Schedules.

Ibid. s. 9.
46 Vic. No. 17, s. 295.

22. Any attesting witness to the execution of any will or codicil, deed, or instrument in writing, and any other competent person, may verify and prove the signing, sealing, publication, or delivery of any such will, codicil, deed, or instrument in writing by such declaration in writing made as aforesaid before such justice, notary, or officer.

Wills, deeds, &c., may be verified by declaration.
9 Vic. No. 9. s. 8

23. Whenever any declaration is made and subscribed by any person under or in pursuance of any of the provisions of this Part of this Act, every such fee as would have been due and payable on the taking or making of any oath or affidavit, shall be in like manner due and payable upon making and subscribing such declaration.

Fees.
Ibid. s. 10.

24. In all cases where by this Part of this Act, or under the authority thereof, or by virtue of any power or authority hereby given, a declaration—

Form of declaration.
Eighth and Ninth Schedules.

(a) is substituted in lieu of an oath or affidavit ; or

Ibid. s. 11.
46 Vic. No. 17 s. 295.

(b) is directed or authorised to be made and subscribed, although not substituted in lieu of an oath or affidavit,

such declaration, unless otherwise directed by the powers hereby given, shall be in the form, or to the effect of the form, in either the Eighth or the Ninth Schedule to this Act.

S. 25.

False declaration.

9 Vic. No. 9,
ss. 4, 9, 12.

25. In all cases where by this Part of this Act, or under the authority thereof, or by virtue of any power or authority hereby given, a declaration--

(a) is substituted in lieu of an oath or affidavit ; or

(b) is directed or authorised to be made and subscribed, although not substituted in lieu of an oath or affidavit,

any person who wilfully and corruptly makes and subscribes any such declaration, knowing the same to be untrue in any material particular, shall be guilty of a misdemeanour.

PART V.

AFFIDAVITS.

Justices empowered to take affidavits.

37 Vic. No. 10,
s. 1.

26. Every justice of the peace shall have power to take and receive affidavits in all matters pending in any Court.

To enable a justice of the peace to take an affidavit for use in the Supreme Courts the matter must be pending in that Court. On an application for a mandamus. the affidavits on which the rule *nisi* had been granted had been sworn before a J.P. On the objection being taken it was urged that the matter was pending in the Small Debts Court when the affidavits were sworn ; but it was held the matter must be pending in the Court in which the affidavit is to be used : *Ex parte Leonard*, (1895) 11 W.N. 165 ; *Ex parte Staunton*, (1898) 14 W.N. 126.

In *Jones v. Jones*, (1898) 19 N.S.W.R. 43 ; 14 W.N. 207, affidavits to found a motion for attachment for contempt were sworn before a J.P., the suit was in the Divorce Jurisdiction, but it was held that the application was outside the divorce suit and that the affidavits were wrongly sworn as the attachment motion was not a matter pending at the time the affidavits were sworn.

Appointment of commissioners for affidavits.

Ibid.

27. (1) The Chief Justice of the Supreme Court may by commission, under the seal of the said Court, authorise as many persons as he may think necessary to take and receive affidavits concerning any matter within the jurisdiction of any Court.

(2) Every such commission heretofore issued by any Chief Justice and now in force shall be deemed to have been issued under this Act.

Fees.

Ibid. s. 2.

28. Every person authorised to act under any such commission shall receive such fees as may be prescribed by rule of the Supreme Court.

Penalty for swearing falsely in affidavits.

Ibid. s. 1.

29. Every person wilfully swearing falsely in any affidavit made before any such justice of the peace or other person so authorised to take affidavits, shall be deemed guilty of perjury and shall incur and be liable to the same pains and penalties as if he had wilfully sworn falsely in open Court in a judicial proceeding in the Supreme Court.

SCHEDULES.

Sch. 1.

FIRST SCHEDULE.

Section 2.

Reference to Act.	Title or short title.	Extent of repeal.
9 Vic. No. 9	An Act for the more effectual abolition of oaths and affirmations taken and made in various departments of the Government of New South Wales and to substitute declarations in lieu thereof, and for the suppression of voluntary and extra-judicial oaths and affidavits.	The whole.
20 Vic. No. 9	An Act to simplify the oaths of qualification for office.	The whole.
20 Vic. No. 31	The Common Law Procedure Act of 1857 ..	Section 10.
22 Vic. No. 7	An Act for the further amendment of the law of evidence.	The unrepealed portion.
22 Vic. No. 18	District Courts Act of 1858	So much of section 48 as relates to section 10 of the Common Law Procedure Act of 1857.
33 Vic. No. 14	Promissory Oaths Act	The whole.
36 Vic. No. 31	Promissory Oaths Declaratory Act of 1873 ..	The whole.
37 Vic. No. 10	Commissioners for Affidavits Act of 1874 ..	The whole
40 Vic. No. 8	Evidence Further Amendment Act of 1876 ..	The unrepealed portion.
46 Vic. No. 17	Criminal Law Amendment Act of 1883 ..	Section 295, from and including the words "And every solemn declaration" to the end of the section; sections 339 and 343, and the Seventh Schedule

SECOND SCHEDULE.

Sections 3, 4, 5
33 Vic. No. 14.
s. 2.

Oath of allegiance.

I, _____, do swear that I will be faithful and bear true allegiance to Her Majesty Queen Victoria, Her Heirs and Successors according to law.
So help me God.

THIRD SCHEDULE.

Section 5.
37 Vic. No. 10,
s. 3.

Official oath.

I, _____, do swear that I will well and truly serve Her Majesty Queen Victoria in the office of _____
So help me God.

FOURTH SCHEDULE.

Section 5,
Ibid. s. 4.

Judicial oath.

I, _____, do swear that I will well and truly serve our Sovereign Lady Queen Victoria in the office of _____, and I will do right to all manner of people after the laws and usages of this colony without fear or favour, affection or ill-will.
So help me God.

Sch. 5.**FIFTH SCHEDULE.***Executive Councillor's oath.*

Section 5.

37 Vic. No. 10.
s. 5.

I, , being chosen and admitted of Her Majesty's Executive Council in New South Wales, do swear that I will to the best of my judgment at all times when thereto required freely give my counsel and advice to the Governor or Officer Administering the Government of New South Wales for the time being for the good management of the public affairs of New South Wales, that I will not directly or indirectly reveal such matters as shall be debated in council and committed to my secrecy, but that I will in all things be a true and faithful councillor.

So help me God.

Section 13.

46 Vic. No. 17,
s. 343.**SIXTH SCHEDULE.***Declaration.*

I solemnly declare that the evidence now about to be given (or the statement now about to be made) by me shall be the truth, the whole truth, and nothing but the truth.

Section 13.

20 Vic. No. 31.
s. 10.**SEVENTH SCHEDULE.***Affirmation.*

I, , do solemnly, sincerely, and truly affirm and declare, &c.

Sections 21, 24.

9 Vic. No. 9.
Schedule.**EIGHTH SCHEDULE.***Declaration.*

I, , do solemnly and sincerely declare that , and I make this solemn declaration conscientiously believing the same to be true, and by virtue of the provisions of the Oaths Act, 1900.

Sections 21, 24

46 Vic. No. 17,
Schedule 7.**NINTH SCHEDULE.***Declaration.*

I, , of (residence), do hereby solemnly declare and affirm that [the facts to be stated according to the declarant's knowledge, belief, or information, severally]. And I make this solemn declaration, as to the matter (or matters) aforesaid, according to the law in this behalf made—and subject to the punishment by law provided for any wilfully false statement in any such declaration.

PROHIBITION AND MANDAMUS ACT 1901.

TABLE

Showing how the sections of Acts consolidated have been dealt with.

Sections of Repealed Acts.	Section of Consolidated Act.	Remarks.
5 Will. IV, No. 8, ss. 1, 2		Adopts 1 Will. IV, c. 21 ; 1 and 2 Will. IV, c. 58 ; and other Acts.
9 Anne, c. 20, s. 1	8	This and the following sections of this Act are applied to all writs of mandamus by 1 Will. IV, c. 21, s. 3.
2	9-11	
3	12	
6	13	
7		Part only of section applies to mandamus. Omitted. See Common Law Procedure Act, 1899, s. 175.
1 Will. IV, c. 21, s. 1	4-7	Repealing section only. Applying certain provisions of 9 Anne, c. 20, <i>supra</i> .
2	.....	
3	8-13	
4	14-16	
5	17	
6	18	
1 & 2 Will. IV, c. 58		Dealt with in Interpleader Act, 1901.
1-7		
8	14	

ACT No. XLIV., 1901.

An Act to consolidate enactments relating to proceedings in Prohibition and on Writs of Mandamus.
[Assented to, 7th November, 1901.]

BE it enacted by the King's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and Legislative Assembly of New South Wales in Parliament assembled, and by the authority of the same, as follows :—

PART I.

PRELIMINARY.

1. This Act may be cited as the "Prohibition and Mandamus Act, 1901," and is divided into Parts, as follows :—

PART I.—PRELIMINARY—ss. 1-3.

PART II.—PROHIBITION—ss. 4-7.

PART III.—MANDAMUS—ss. 8-18.

S. 2.

Repeal.
Schedule:
Saving.

2. (1) The Act mentioned in the Schedule to this Act is, to the extent therein expressed, hereby repealed.

(2) Nothing herein shall be deemed to affect the provisions of the Common Law Procedure Act, 1899.

Interpretation.

3. In this Act, unless the context or subject matter otherwise indicates or requires,—

“Court” means the Supreme Court of New South Wales.

PART II.
PROHIBITION.

Application
for writs of
prohibition
may be made
on affidavit
only.

1 W. IV. c. 21,
s. 1.

Form and
contents of
declaration.
Ibid.

4 It shall not be necessary to file a suggestion on any application for a writ of prohibition, but such application may be made on affidavits only.

5. (1) If the party applying is directed to declare in prohibition before writ issued, such declaration shall be expressed to be on behalf of such party only, and not on behalf of the party and of His Majesty.

(2) Such declaration shall contain and set forth in a concise manner so much only of the proceeding in the Court below as is necessary to show the ground of the application, without alleging the delivery of a writ or any contempt, and shall conclude by praying that a writ of prohibition may issue.

Defendant may
demur or
plead.
Ibid.

6. To such declaration the party defendant may demur or plead such matters by way of traverse or otherwise as may be proper to show that the writ ought not to issue, and conclude by praying that such writ may not issue.

Judgment.
Ibid.

7. (1) Judgment shall be given that the writ of prohibition do or do not issue, as justice may require.

Costs.
Ibid.

(2) The party in whose favour judgment is given, whether on nonsuit, verdict, demurrer, or otherwise, shall be entitled to the costs attending the application and subsequent proceedings, and have judgment to recover the same.

Damages.
Ibid.

(3) If a verdict is given for the party plaintiff in such declaration the jury may assess damages, for which judgment shall also be given, but such assessment shall not be necessary to entitle the plaintiff to costs.

PART III.
MANDAMUS.

Returns to be
made to the
first writ.

9 Anne, c. 20,
s. 1.
1 Wm. IV, c. 21,
s. 3.

8. Where a writ of mandamus issues out of the Court, every person by law required to make a return to such writ shall make his return to the first writ of mandamus.

Pleadings upon
return to writ.
9 Anne, c. 20,
s. 2.
1 Wm. IV, c. 21,
s. 3.

9. Where a writ of mandamus issues out of the Court, and a return is made thereunto, the person suing or prosecuting such writ may plead to or traverse all or any the material

facts contained within the said return, to which the person making such return may reply, take issue, or demur, and such further proceedings and in such manner shall be had therein for the determination thereof as might have been had if the person suing such writ had brought his action on the case for a false return. §. 9.

10. If any issue is joined on such proceedings, the person suing such writ may try the same in such place as an issue joined in such action on the case might have been tried. Venue.
1 Will. IV, c. 21,
s. 4.

11. (1) If a verdict is found for the person suing such writ, or judgment given for him upon a demurrer, or by nillit, or for want of a replication or other pleading— Effect of ver-
dict or judg-
ment.
Ibid.

(a) he shall recover his damages and costs in such manner as he might have done in such action on the case; and

(b) a peremptory writ of mandamus shall be granted without delay for him as might have been if such return had been adjudged insufficient.

(2) If judgment is given for the person making such return to the writ, he shall recover his costs of suit.

12. If any damages are recovered by virtue of this Act against any such person making such return, he shall not be liable to be sued in any other action or suit for the making such return. Person against
whom damages
recovered not
liable to other
action.
9 Anne, c. 20,
s. 3.
1 Will. IV, c. 21,
s. 3.

13. The Court may allow the person to whom any writ of mandamus is directed, or the person suing or prosecuting the same, such convenient time to make a return, plead, reply, rejoin, or demur, as to the Court seems just and reasonable. Time for return-
ing, pleading, &c.
9 Anne, c. 20,
s. 6.
1 Will. IV, c. 21
s. 3.

14. Whereas writs of mandamus are sometimes issued to officers and other persons commanding them to admit to offices or do or perform other matters in respect whereof they claim no right or interest or their functions are merely ministerial, and it may be proper that such officers or persons should in certain cases be protected against the payment of damages or costs to which they may otherwise become liable :— Persons inter-
ested may be
called on to
show cause.
Ibid. s. 5.
1 & 2 Will. IV,
c. 58, s. 8.

(1) The Court upon application for any writ of mandamus may make rules and orders calling, not only upon the person to whom such writ may be required to issue, but also upon any other person having or claiming any right or interest in or to the matter of such writ to show cause against the issue of such writ and payment of costs of the application.

(2) Upon the appearance of such other person, in compliance with any such rule or order, or in default of appearance after service thereof, the Court may exercise all such powers and authorities, and make all such rules and orders applicable to the case as are given or mentioned by or in the Interpleader Act, 1901. Application of
Interpleader
Act.
Ibid.

15. The return to any such writ shall be made, and the issues in fact or in law upon any traverse thereof or demurrer shall be joined by and in the name of the person to whom the writ is directed; but the same may, if the Court so direct, be Return, &c.,
may be ex-
pressed to be
on behalf of
person
interested.
1 Wm. IV, c. 21,
s. 4.

S. 15. expressed to be made and joined on the behalf of such other person as is mentioned in such rule or order.

Proceedings by
and against
such person.

1 Wm. IV, c. 21,
s. 4.

16. In that case such other person may frame the return and conduct the subsequent proceedings at his own expense, and if any judgment is given for or against the party suing such writ, such judgment shall be given against or for such other person, who shall have the like remedy for the recovery of costs and enforcing the judgment, as the person to whom the writ is directed would otherwise have had.

Proceedings
not to abate on
death, resigna-
tion, or
removal of
person making
return.

Ibid. s. 5.

17. If the return to any such writ is, in pursuance of the authority given by this Act, expressed to be made on behalf of any other person as aforesaid, the further proceedings on such writ shall not abate or be discontinued by the death, or resignation, or removal from office of the person having made such return; but the same shall be continued and carried on in the name of such person, and if a peremptory writ is awarded, it may be directed to any successor in office or right to such person.

Costs in dis-
cretion of
Court.

Ibid. s. 6.

18. In all cases of application for any writ of mandamus whatsoever, the costs of such application, whether the writ is granted or refused, and also the costs of the writ, if the same is issued and obeyed, shall be in the discretion of the Court; and the Court may order by whom and to whom the same shall be paid.

SCHEDULE.

Reference to Act.	Title or Short Title.	Extent of Repeal.
5 Will. IV.No. 8	An Act for adopting and applying certain Acts of Parliament passed in the eleventh year of the reign of His late Majesty, and first year of the reign of his present Majesty, and in the first and second years of the reign of His present Majesty respectively in the administration of justice in New South Wales in like manner as other laws of England are applied therein.	The whole, in to far as it applies to the Acts 1 Will. IV c. 21, and 1 & 2 Will. IV c. 58.

PRIVY COUNCIL.

APPEAL TO THE PRIVY COUNCIL.

[The enactments and rules relating solely to the constitution of, and the procedure before, the Judicial Committee have not been inserted. They will be found printed in full in Oliver's Statutes, pp. 1828, *et seq.*]

By the English Act 9 Geo. IV, c. 83, s. 15, it was enacted as follows :—

* * * * *

15. And be it further enacted That it shall and may be lawful for His Majesty by the said Charters or Letters Patent respectively or by any Order or Orders of His Majesty in Council to allow any person or persons feeling aggrieved by any judgment decree order or sentence of the said Supreme Courts respectively to appeal therefrom to His Majesty in Council in such manner within such time and under and subject to such rules regulations and limitations as His Majesty by any such Charters or Letters Patent or Order or Orders in Council respectively shall appoint and prescribe.

Under an earlier Act (4 Geo. IV, c. 96) there was an appeal in the first instance from the Supreme Court to the Court of Appeals constituted by the Governor assisted by the Chief Justice. From this Court an appeal lay to His Majesty, under the provisions of the Charter of Justice. By the repeal of the Act 4 Geo. IV, the Court of Appeals was abolished and the provisions of the Charter of Justice providing for appeal from this Court to the Privy Council became nugatory ; and for a time, apparently there was no right of appeal to the Privy Council, though no doubt leave might have been obtained from the Privy Council to appeal.

Provision for appeal under this Act (9 Geo. IV., c. 83) was ultimately made by order in Council, as follows :—

ORDER IN COUNCIL (13th November, 1850).*

WHEREAS, &c. [recites amongst other things the authority to establish the Supreme Court of New South Wales under the Act 4 Geo. IV, c. 96 ; the establishment of the Court under the Charter of Justice ; and the confirmation of the Charter under the Act 9 Geo. IV, c. 83] And WHEREAS, &c. [recites s. 15 of the Act 9 Geo. IV, c. 83 *supra*] And WHEREAS no such Charters, or Letters Patent, or Orders in Council have hitherto issued under the authority of the said last mentioned Act ; and WHEREAS it is expedient that provision should be made to enable parties to appeal from the decisions of the said Supreme Court to Her Majesty in Council.]

1. It is hereby ordered by the Queen's Most Excellent Majesty, by and with the advice of her Privy Council, that any person or persons may appeal to Us, Our Heirs and Successors, in our or their Privy Council, from any final judgment, decree, order, or sentence of the Supreme Court of New South Wales, in such manner, within such time, and under and subject to such rules, regulations, and limitations, as are hereinafter mentioned ; that is to say :—

Final judgment.—An order discharging a rule *nisi* for a new trial is final : *Howard Smith v. A.S.N. Co.*, (1885) 2 W.N. 12. An order making such a rule absolute is interlocutory ; see notes to par. 6 (*post*) ; though an order granting a new trial may be substantially final : *Simpson v. Bank of N.Z.*, (1899) 15 W.N. 170 ; *Denham v. Foley*, (1899) 15 W.N. 232, reversing *ibid.* 170. Where a new trial is

* From Gazette of 24 June, 1851. The division into paragraphs and the side notes are adopted from Stephen's Practice, ed. 1856.

Par. 1 granted on one only of several grounds, no appeal lies under this par. against the refusal to grant it on the other grounds, such an order not being final : *Smith v. Neild*, (1889) 6 W.N. 71 ; see *Brown v. Citizens' Life Co.*, (No. 3), (1902) 19 W.N. 134, 227.

Question of Costs.—As a general rule no appeal lies on a question of costs alone. But where the plaintiff in a slander action had recovered a farthing damages, and the Prothonotary having refused to tax the costs on the ground that by the Act 21 Jac. 1, c. 16, s. 6, plaintiff was entitled to no more costs than damages, the Court had ordered him to tax the costs, holding that the section referred to was repealed by the Defamation Act ; the defendant was granted leave to appeal as the interpretation of an Act of Parliament was involved : *Davies v. Harris*, (1884) 5 N.S.W.R. 55.

An appeal was refused when the question related merely to the practice to be followed on taxation : *Re Macnamara's Costs*, (1884) 5 N.S.W.R. 434 ; 1 W.N. 33. But where a review of taxation had been ordered (very large sums, apparently considerably over £500, being involved) leave to appeal was granted : *O'Rourke v. Commissioner for Railways*, (1894) 11 W.N. 59.

Of the Supreme Court.—A decree of the Chief Judge in Equity is a decree of the Court and an appeal lies to the Privy Council directly from such decree ; (and leave may be given by the Chief Judge) : *Dean v. Dawson*, (1888) 9 N.S.W.R. Eq. 27 ; 4 W.N. 134 ; *A.-G. v. Municipal Council of Sydney*, (1892) 13 N.S.W.R. Eq. 151 ; 9 W.N. 95.

The right of appeal conferred by the Imperial Act and these orders cannot be taken away by a colonial statute : *Re Barbour*, (1891) 12 N.S.W.R. 90 ; 8 W.N. 7.

Application was made to a Judge under s. 97 of the Real Property Act to order the removal of a caveat, and was refused ; the applicant then made the order of the Judge a Rule of Court and applied for an order granting leave to appeal to the Privy Council from the Rule of Court ; held that leave could not be granted ; the only substantial order against which appeal was desired was that of the Judge ; and there is no power to give leave to appeal against the order of a Judge : *Re Paul*, (No. 2), (1902) 19 W.N. 115.

Where on a liquidator's application to the Equity Court for advice under s. 189 of the Companies Act, 1874, two classes of creditors had appeared and argued their rights, leave was given to the unsuccessful class to appeal to the Privy Council : *Re Anglo-Australian Investment Co.*, (1893) 3 B.C. 108.

Limitation of
amount and
time.

2. In case any such judgment, decree, order, or sentence, shall be given or pronounced, for or in respect of any sum or matter at issue above the amount or value of £500 sterling,—or in case such judgment, decree, order or sentence, shall involve directly or indirectly any claim, demand, or question, to or respecting property or any civil right, amounting to or of the value of £500 sterling,—the person or persons feeling aggrieved by any such judgment, decree, order, or sentence, may, within fourteen days next after the same shall have been pronounced, made, or given, apply to the said Court by Petition, for leave to appeal therefrom to Us, Our Heirs and Successors, in our or their Privy Council.

Sum or matter at issue above £500.—The sum or matter at issue has been held to be above the amount or value of £500 in the following cases :—

Where on verdict for over £500 a new trial was refused on plaintiff consenting to reduce the verdict to £64, which plaintiff did accordingly ; held, nevertheless, that leave to appeal should be granted, the amount in issue when judgment was delivered being above £500 : *Mackenzie v. Williams*, (1872) 11 S.C.R. 193.

Where judgment was signed for £500 and interest : *Ouston v. Bank of New South Wales*, (1877) Knox 90 ; *Proudfoot v. Proctor*, (1887) 8 N.S.W.R. 468 ; 4 W.N. 123.

Also where verdict with interest to date of petition exceeded £500, though judgment had been signed for less than £500 : *Graham v. Proudfoot*, (1894) 15 N.S.W.R. 452. Where judgment was on the interpretation of a will involving to the party appellant more than £500 : *Ex parte Commissioners for Railways, In re Sarah Williams*, (1899) 20 N.S.W.R. Eq. 28 ; 15 W.N. 223. Where in a libel action £2000 was claimed and the jury found a verdict for the defendant, the Court ordered a new trial ; on petition for leave to appeal to the Privy Council leave was granted, the Court holding that more than £500 was involved : *Christie v. Robertson*, (1889) 6 W.N. 98.

Par. 2.

Where probate of a will had been refused the plaintiff (executrix and sole legatee and devisee under the will) applied for leave to appeal to the Privy Council; the affidavits leaving it doubtful whether the real and personal estate together were of greater value than £500, it was referred to the Registrar to ascertain the value and on his finding that the value was more than £500 leave was granted: *Buckley v. Millar*, (1869) 8 S.C.R. Eq. 123.

The sum or matter at issue has been held *not* to be above the amount or value of £500:—Where the plaintiff obtained a verdict for a farthing in an action claiming £10,000 though by the order sought to be appealed against a new trial was granted on the ground that the damages were insufficient: *Jones v. Municipal Council of Sydney*, (1880) 1 N.S.W.R. 320; *sed. v. Christie v. Robertson*, *supra*. When the right to enter in a cemetery was in question, and the value of the appellant's land in the cemetery was only £111, though he himself set a far higher value on his rights: *Naylor v. Slattery*, (1886) 2 W.N. 55.

Where the appellant's affidavit contained a bald statement that the value of the matter at issue exceeded £500, and the respondent filed affidavits to prove that the value was much less, the appellant was not allowed to file affidavits in reply: *Hunt v. Archer*, (1889) 6 W.N. 68.

Plaintiff having obtained judgment on demurrer to a declaration claiming £2000 was allowed to amend by reducing the claim to £450, and so defeat defendant's right to appeal: *Dowling v. Jones*, (1881) 2 N.S.W.R. 54; T.T.R. 8. But the Court is not disposed to extend this principle. Where defendant applied for leave to appeal against an order setting aside a verdict for defendant in an action claiming £1000, plaintiff was not allowed to reduce the claim: *Delamont v. Australian Kerosene Co.*, (1884) 1 W.N. 29.

£500 indirectly involved—In the following cases it has been held that claims of the value of £500 were indirectly involved:—Where, though the decision in terms related only to the costs of an award, it was sworn that the matter involved the right to the lease of a station worth more than £500: *Tyson v. McEvoy*, (1864) 3 S.C.R. 365. Where the decision in an action to recover duty amounting to £79 involved the obligation on the part of the plaintiff to pay duty on other importations amounting to over £800: *Peacock v. Powell*, (1886) 2 W.N. 108. Where, though a verdict was returned for 40/- only, the action involved the right to the exclusive occupation of a theatre box, and this right was sworn to be of the value of £500: *Went v. Moss*, (1889) 5 W.N. 153. See also *A.-G. v. Municipal Council of Sydney*, (1892) 13 N.S.W.R. Eq. 151; 9 W.N. 95; where it was also held that the Crown coming into Court is bound by the Orders in Council.

£500 not involved.—But where a municipality had sued for £18 due as rates but had failed on the defence that the municipality was not duly incorporated, and there were rates in arrear amounting to £600, the Court here held that a civil right to above the amount of £500 was involved, the interest of the party appellant being the matter to be considered and granted leave to appeal: *Municipal District of Gundagai v. Norton*, (1894) 15 N.S.W.R. 459; 11 W.N. 91; but the Privy Council rescinded the leave: 19 N.S.W.R. 395, *in nota*. And where an official liquidator had failed to fix an alleged contributory on the list for a liability of £300 on grounds which affected the liability of other contributories, in sums on the whole exceeding £500, leave to appeal was refused: *In re Benang G.M. Co., Ltd.*, (1894) 4 B.C. 47. And so in *Wavertree Sailing Ship Co. v. Love*, (1895) 12 W.N. 62; following *Morse's* case in which the sum claimed was only £300, though the action was carried on at the expense of a fund contributed by the plaintiffs in several actions against the same defendants, arising out of the same subject-matter, in which the aggregate amount claimed exceeded £500; *Morse v. A.S.N. Co.*, (1870) 9 S.C.R. 81. In this case it was held that though the application was refused for want of jurisdiction, the Court had power to grant costs against the applicant.

And leave was refused where the amount involved was £250, the income tax for one year, although similar taxes for other years due by the same person were governed by the decision and came to over £500: *In re Tindall*, (1898) 14 W.N. 134; followed in *Borough of Randwick v. Dangar*, (1898) 19 N.S.W.R. 395; 15 W.N. 104; reversing *Cohen, J.*, 15 W.N. 56.

In a suit for redemption of mortgaged property worth £11,000, the only question was the liability for £80 interest; leave was refused: *Cape v. Trustees of the Savings Bank*, (1893) 10 W.N. 68.

Civil right.—A decree nisi for a divorce is a decree involving a civil right against which an appeal will lie: *Sims v. Sims*, (1878) 1 S.C.R. N.S. Div. 5; see *Municipality of Gundagai v. Norton*, *supra*. But in *Chard v. Harrison*, (1903) 20 W.N.

Par. 2. 10, the Court refused to grant leave to appeal against an order of the Full Court, reversing a decree of nullity of marriage, not being satisfied that there was a civil right of over the value of £500 in dispute.

Person feeling aggrieved.—An injunction obtained by the plaintiff in a suit was set aside on the ground that plaintiff's solicitors had acted without authority and the solicitors were ordered to pay the costs. An application by the solicitors in the name of the plaintiffs for leave to appeal against this decision was refused: *Hawkins Hill G.M. Co. v. Briscoe*, (1888) 4 W.N. 132.

Within fourteen days.—The Court has no jurisdiction to grant leave to appeal if the petition be filed after the expiration of fourteen days: *Fisher v. Thornton*, (1863) 2 S.C.R. 161. Sundays and holidays are to be counted in reckoning the fourteen days: *Perpetual Trustee Co. v. a'Beckett*, (1900) 17 W.N. 69. But it is sufficient if the petition be filed within time though the application to the Court be not made till afterwards: *Barclay v. Bank of N.S.W.*, (1879) 2 S.C.R. N.S. 66, following *Wallack v. Lloyd*, (1861) *ibid*, in *nota*.

Apply to the Court by petition.—The petition is to the Court; but out of term the order may be made by a Judge under the powers conferred by the Supreme Court and Circuit Courts Act, 1900, s. 20, and the order must be confirmed: *Wallack v. Lloyd*, (1861) 2 S.C.R. N.S. 66 (in *nota*); *Want v. Bennett*, (1879) 2 S.C.R. N.S. 311.

The proper method of appealing from an order of a Judge granting or refusing leave is by opposing the confirmation when the Court may set aside the order granting leave: *Borough of Randwick v. Dangar*, 19 N.S.W.R. 395, *supra*; or refuse to confirm the order refusing leave and grant leave themselves: *Ex parte Commissioners for Railways, In re Sarah Williams*, (1899) 20 N.S.W.R. Eq. 28; 15 W.N. 223; *Denham v. Foley*, (1899) 15 W.N. 232.

In Equity matters the Chief Judge has jurisdiction to grant leave to appeal: *A.G. v. Municipal Council of Sydney*, (1892) 13 N.S.W.R. Eq. 151; 9 W.N. 95; *Dean v. Dawson*, (1888) 9 N.S.W.R. Eq. 27; 4 W.N. 134; *semble*, under the powers conferred by the Equity Act and without any necessity to have his order confirmed; and see *Re Underwood Estate Acts*, (1888) 5 W.N. 44.

By R. 210 the Court dealing with petitions to appeal to the Privy Council may be composed of two Judges sitting as in Banco, either in or out of term.

The petition.—The petition will of course be entitled in the Supreme Court; it should state shortly the material steps in the cause leading up to and including the order appealed from; and that the sum or matter at issue is above the amount or value of £500, or that the judgment involves directly or indirectly a claim, demand or question to or respecting property or any civil right amounting to or of the value of £500, as the case may be. It may be signed by the attorney (or the town agent of a country attorney: *Mate v. Nugent*, (1868) 7 S.C.R. 342).

The motion must be made on affidavit, shortly verifying the petition. But if there is likely to be any question as to value, full affidavits on this point should be filed: see *Hunt v. Archer*, (1889) 6 W.N. 68 (*supra*).

Staying
execution:

3. And in case such leave to appeal shall be prayed by the party or parties who is or are directed to pay any such sum of money or perform any duty, the said Court shall and is hereby empowered, either to direct that the judgment, decree, order, or sentence appealed from shall be carried into execution, or that the execution thereof shall be suspended, pending the said appeal, as to the said Court may appear to be most consistent with real and substantial justice (b);

The Court may consist of two Judges: R. 210 (*post*).

As a general rule the Court will not suspend execution pending appeal: *Cameron v. Hay*, (1862) 1 S.C.R. 7; even where the Court is equally divided in opinion on the decision appealed from: *Byrnes v. Williams*, (1862) 1 S.C.R. 9.

On appeal from an order granting a new trial, the Court stayed all proceedings under the order for twelve months: *Campbell v. Commercial Bank*, (1877) Knox at p. 254. In another case the new trial was ordered to proceed, the plaintiff, if successful, to pay verdict and costs into Court to abide the result of the appeal: *McPherson v. Borough of Bathurst*, (1877) Knox 370. The Judge at Nisi Prius refused to stay the new trial pending appeal, though suggesting that the Court might stay execution: *Simpson v. Bank of N.Z.*, (1899) 15 W.N. 170; see also *Denham v. Foley*, (1899) 15 W.N. 170. The Court refused to stay proceedings on a judgment in eject-

Par. 3.

ment pending an appeal, but suspended the issue of the *habere* for six months : *Laing v. Bain*, (1877) Knox 284. The Court refused to make any order for suspending or carrying into execution a decree *nisi* for divorce pending an appeal : *Sims v. Sims*, (1878) 1 S.C.R. N.S. Div. 5. An order of a single Judge staying new trial proceedings pending an appeal was reversed by the Court : *Want v. Bennett*, (1879) 2 S.C.R. N.S. 311, on the motion to confirm the order.

An order restraining the Registrar-General from issuing a certificate of title to the defendant in ejectment having been set aside, the defendant gave plaintiff notice to proceed to trial. An application by plaintiff to have the action stayed pending appeal was refused : *Nicholls v. Lee*, (1890) 7 W.N. 22 ; and see a consent order : *Solling v. Broughton*, (1891) 8 W.N. 45.

Where an injunction had been granted at the suit of the Attorney-General, restraining the defendants from making a charge for entrance on certain lands, the defendants in obtaining leave to appeal to the Privy Council asked to have the decree suspended pending appeal. *Owen, J.*, refused to make any order, holding that this par. and the next must be read together, and that the only cases in which the Court would make an order were "where a party is directed to pay a sum of money" or "to perform a duty," and that this case did not fall under either of these heads : *A.-G. v. Municipal Council of Sydney*, (1892) 13 N.S.W.R. Eq. 151 ; 9 W.N. 95.

The party successful here is not bound to prosecute his rights pending appeal : *McMahon v. Brewer*, (1897) 14 W.N. 73.

The Court of Equity has no jurisdiction to grant an injunction staying proceedings pending an appeal, unless there be some ground of equity outside of or contrary to the legal rights of the parties : *Brown v. Patterson*, (1883) 4 N.S.W.R. Eq. 1A. *

4. And in case the said Court shall direct such judgment, decree, order, or sentence to be carried into execution, the person or persons in whose favor the same shall be given, shall, before the execution thereof, enter into good and sufficient security, to be approved by the said Court, for the due performance of such judgment or order, as We, Our Heirs and Successors, shall think fit to make thereupon ; Security for performance.

Or, in case the said Court shall direct the execution of any such judgment, decree, order, or sentence to be suspended, pending the appeal, the person or persons against whom the same shall have been given, shall in like manner, and before any order for the suspension of any such execution is made, enter into good and sufficient security to the said Court, for the due performance of such judgment or order, as We, Our Heirs and Successors, shall think fit to make thereupon.

See preceding paragraph. Where an order restraining the Registrar-General from issuing a certificate of title to an applicant under the Real Property Act was set aside, and the caveator obtained leave to appeal, the applicant was ordered (*Innes, J.*, diss.) to give security under this rule, though the judgment appealed from did not direct the payment of a sum of money or the performance of any duty : *Nicholls v. Lee*, (1890) 7 W.N. 22. The party successful here is not, however, bound to prosecute his rights pending appeal : *McMahon v. Brewer*, (1897) 14 W.N. 73.

Plaintiff obtained leave to appeal against an order granting a new trial, defendant to be at liberty to proceed on the order upon giving security under this rule. Notice of trial given by defendant before the security was entered into was set aside : *Ellis v. South British Insurance Co.* (1891) 8 W.N. 22.

The prothonotary is not bound to direct the sureties to attend to be cross-examined upon their affidavits of justification : *Hungerford v. Davenport*, (1880) 1 N.S.W.R. 105.

In *Simpson v. Bank of New Zealand*, (1899) 15 W.N. 170. where defendant applied for leave to appeal against an order of the Court granting a new trial leave was given to appeal, and plaintiff was ordered to give security in the event of his proceeding to recover the costs of the new trial motion ; but plaintiff was allowed to go on with the new trial.

* The paging of this volume is wrong, the numbering 1-11 appearing twice over.

Par. 4.

Plaintiff's suit was to establish a lien on a certain fund ; the suit was dismissed. Plaintiff obtained leave to appeal to the Privy Council, and asked that an order be made that defendants should give security not to dispose of the fund pending appeal ; the Court doubted their power to make such order, but *held* that it was not a case for exercising such power : *Dean v. Byrnes*, (1862) 2 S.C.R. Eq. 15.

Security for
costs, &c.

5. And in all cases We will and require that security shall also be given by the party or parties appellant, to the satisfaction of the said Court, for the prosecution of the appeal, and for the payment of all such costs as may be awarded by Us, Our Heirs and Successors, or by the Judicial Committee of Our Privy Council, to the party respondent :

And, if such last-mentioned security shall be entered into within three months from the date of such Petition for leave to appeal, then, and not otherwise, the said Court shall allow the appeal ; and the party or parties appellant shall be at liberty to prefer and prosecute his, her, or their appeal to Us, Our Heirs and Successors, in Our or Their Privy Council, in such manner, and under such rules, as are or may be observed in appeals made to Us from Our Plantations or Colonies.

The Court has no power to grant a pauper leave to appeal without giving security ; if it is a case for appeal the order will be made on the usual terms : *Ex parte Commissioners for Railways*, (1899) 20 N.S.W.R. Eq. 28 ; 15 W.N. 223 ; see *Comber v. Hogg*, and *Hendy v. Jenkins*, *post*, par. 7, in notes. Under the old practice, although security was given within the three months under this order, yet the party appellant sometimes delayed proceeding further with the appeal ; and there was no means of compelling him to do so : *Godfrey v. Poole*, (1885) 6 N.S.W.R. 39 ; 1 W.N. 105. The Court accordingly, in 1892, altered the practice in accordance with a memorandum, printed 8 W.N. 86, and now substantially embodied in RR. 211-213 (*post*).

The practice under these Rules is that on the petition being heard the Court makes an order giving conditional leave to appeal, fixing the amount of security to be given for the costs of the appeal ; and also directing a sum of money to be lodged within a time fixed by the Court, usually a fortnight or three weeks to cover the costs of preparation of the transcript. The usual order is in the following form :—

[TITLE.]

[Date.]

Upon reading the (petition) and (affidavit) and (notice of motion) And upon hearing (Counsel) It is ordered that the said appeal be and the same is hereby allowed And that the (appellant) do give security to the satisfaction of the Prothonotary of this Honourable Court in the sum of £200 for the due prosecution of this appeal and for the payment of such costs as may be awarded by His Majesty in His Majesty's Privy Council to the abovenamed (respondent) or may become due to the (respondent) in case this appeal stand dismissed for want of prosecution or for the payment of the (respondent's) costs in case the (appellant) does not obtain a final order for leave to appeal [And it is further ordered that pending such appeal the (respondent's) right to carry into execution such judgment be suspended] or [that the respondent be at liberty to proceed if any special order be made] And it is further ordered that the (appellant) do within fourteen days lodge with the Prothonotary the sum of £15 to cover the costs of preparation of the transcript record and that the (appellant) do within three months from the date of the said petition take out all necessary appointments to settle the index to the transcript record and to enable the Prothonotary or in his absence the Chief Clerk to certify that the index has been settled and that the conditions of this order on the part of the (appellant) have been complied with And it is further ordered that the costs of both parties of and occasioned by this application and by the preparation of the transcript record when taxed by the proper officer of this Honorable Court be stated and certified on the transcript record herein and forwarded to the Registrar of His Majesty's Privy Council and that such costs shall abide the judgment of the Privy Council or the result of the appeal in case the same shall be dismissed for want of prosecution or in case the (appellant) does not obtain a final order for leave to appeal.

If the terms of this order are duly complied with and a certificate of the Prothonotary obtained the final order will be " that the said appeal be and the same is hereby

allowed." This may be obtained *ex parte*; and the order may be obtained from the Court, or in vacation from a Judge.

Par. 5.

The words of R. 213 are peculiar; if the appellant produces the required certificate to "the Court or in vacation to a Judge" then "the Court" will allow the appeal. It is to be observed that leave to appeal under the Orders in Council can only be given by the Court (or by a Judge acting under special powers as the Court). It would therefore appear that if a Judge gives final leave to appeal in accordance with this memorandum it will be under the power conferred by the Act No. 35 of 1900, s. 20 (the old Act 4 Vic. No. 22, s. 27) and his order giving final leave must be confirmed under that section: *Brown v. Citizens' Life Co.* (1903) 20 W.N. 16; where a certificate under the hand of the Chief Clerk was held sufficient under the memorandum referred to (*supra*); but will not be so under the Rule, 213; but see R. 1 of 25th March, 1903 (*post*).

Where security had not been given within three months, the Court on motion discharged the leave to appeal: *Smith v. Smyth*, (1890) 7 W.N. 89; see *In re Knight*, (1898) 14 W.N. 84; though in *Ex parte Commissioners for Railways*, (1899) 16 W.N. 38, the Court dismissed a similar application (to discharge the leave) on the ground that the terms of the conditional order not having been complied with, the order lapsed. The Court further suggested that provision for such case should be made in the order by the insertion of some such words (as to costs) as "to abide the result in case the appellant does not obtain a final order for leave to appeal."

Where an appeal, not having been prosecuted within six months, stood dismissed without further order under Par. V. of the Orders of the 13th June, 1853 (*post*), the respondent applied here for the costs of the appeal; but *Owen*, Ch. J. in Equity, refused to make any order holding that he was *functus officio*, the order granting leave not having provided for such a case: *Carter v. Milson*, (1893) 14 N.S.W.R. Eq. 237; 9 W.N. 120, following *In re Underwood's Will*, (1889) 10 N.S.W.R. Eq. 227. But on application to the Privy Council, the Judicial Committee held that the proper course was to apply here to amend the order giving leave by adding the words "or the result of the appeal in case the appeal should be dismissed for want of prosecution," and on subsequent application that amendment was made here and costs ordered accordingly: *ibid*, 14 N.S.W.R. Eq. 237; 10 W.N. 9.

See form of order, *supra*.

In *Kiddle v. Minister for Lands*, (1900) 16 W.N. 155, the appellant had given a bond under the order, but desired to abandon the appeal. The Court held that they had no power to rescind their order, but by consent ordered the bond to be given up, the appellant undertaking to pay costs.

A wife appealing against a decree *nisi* for divorce will not be required to give security for costs: *Sims v. Sims*, (1878) 1 S.C.R. N.S. Div. 5.

Where the respondent died pending appeal, but the Privy Council gave judgment in her favor, and a suggestion of the death was afterwards entered here, her representatives were held entitled to sue on the bond to recover the costs ordered to be paid by the Privy Council: *Flood v. Egan*, (1899) 20 N.S.W.R. 333; 16 W.N. 64. But where a defendant died and no suggestion was made: see *Purves v. Attorney-General*, (1862) 2 S.C.R. Eq. 7.

6. And further, it is Our will and pleasure, that it shall be lawful for the said Supreme Court, at its discretion, on the Petition of any party who considers himself aggrieved by any preliminary or interlocutory judgment, decree, order, or sentence of the said Supreme Court, to grant permission to such party to appeal against the same to Us, Our Heirs and Successors, in Our or Their Privy Council, subject to the same rules, regulations, and limitations, as are herein expressed respecting appeals from final judgments, decrees, orders, and sentences. Interlocutory orders.

An order refusing a stay of proceedings is interlocutory even though in its practical effect it was final: *Humphery v. McMullen*, (1868) 7 S.C.R. 129. So also is an order granting a new trial: *Parker v. Falkner*, (1889) 10 N.S.W.R. 13; 1 W.N. 82; *Christie v. Robertson*, (1889) 6 W.N. 98; *Simpson v. Bank of N.Z.*, (1899) 15 W.N. 170. But an order discharging a rule *nisi* for new trial is final. (See note to par. 1 (*ante*)).

Where the Court had refused to dissolve an injunction granted in an action of trespass although this was merely an interlocutory order yet as the matter decided was really the whole matter in dispute the Court granted leave to appeal: *Zobel v. Croudeace*, (1897) 18 N.S.W.R. 412; 14 W.N. 74.

Par. 6.

The whole practice on appeal from an interlocutory order is the same as on appeal from a final order : see notes to preceding paragraphs.

7. Provided also that if in any action, suit, or other proceeding, it shall so happen that no final judgment, decree, order, or sentence can be duly given in consequence of a disagreement of opinion between the Judges of the said Supreme Court, then, and in such case, the final judgment, decree, order, or sentence may be entered *pro forma* on the petition of any of the parties to the action, suit, or other proceedings, according to the opinion of the Chief Justice, or in his absence, of the senior Puisne Judge of the said Supreme Court :

Provided that such judgment, decree, order, or sentence shall be deemed a judgment, decree, order, or sentence of the Court, for the purpose of an appeal against the same, but not for any other purpose.

Appeal in special cases.

8. And We do hereby further reserve to Ourselves, Our Heirs and Successors, in Our or Their Privy Council, full power and authority, upon the humble petition at any time of any person or persons aggrieved by any judgment or determination of the said Court, to admit his or their appeal therefrom, upon such terms, and upon such securities, limitations, restrictions, and regulations, as We or They shall think fit ; and to reverse, correct, or vary such judgment or determination, as to Us or Them shall seem meet.

When a pauper litigant had been granted leave to appeal here but on the usual terms as to security, he obtained special leave from the Privy Council to appeal in *forma pauperis* ; apparently abandoning the leave obtained here : *Ex parte Commissioners for Railways*, (1899) 16 W.N. 38. But a pauper applying direct to the Privy Council for leave to appeal, it was refused, the Privy Council apparently distinguishing between leave to appeal and an application to dispense with security : *Comber v. Hogg*, (1900) 18 W.N. 117 ; *Hendy v. Jenkins*, (1901) 18 W.N. 186.

Where leave to appeal has been granted by the Privy Council, the order granting leave must be filed of record in this Court before the officers of the Court can transmit the transcript, &c. : *Perpetual Trustee Co. v. a'Beckett (Bensusan's Appeal)*, (1901) 18 W.N. 186.

"Although in every case the subject cannot demand an appeal as a matter of right, yet the Crown may in every case, in its discretion, on petition for that purpose, grant one, and this not merely where it has * * * made no provision on the subject, but where it has, by Charter, restricted the right of appeal to certain cases only. The Charters generally reserve this power in express terms. But it is conceived that such a clause is for abundant caution only, and unnecessary."—Stephen's Practice, ed. 1843–5, p. 27.

Copy of evidence and Judges' reasons.

9. And it is Our further will and pleasure, that in all cases of appeal allowed by the said Court, or by Us, Our Heirs or Successors, the said Court shall certify and transmit to Us, Our Heirs or Successors, in Our or Their Privy Council, a true and exact copy of all evidence, proceedings, judgments, decrees, and orders, had or made in such cases appealed, so far as the same have relation to the matters of appeal ; such copies to be certified under the seal of the said Court ;

And that the said Court shall also certify and transmit to us, Our Heirs and Successors, in Our or Their Privy Council, a copy of the reasons given by the Judges of such Court, or by any of such Judges, for or against the judgment or determination appealed against, where such reasons shall have been given

in writing ; and, where such reasons shall have been given orally, then a statement in writing of the reasons given by the Judges of such Court, or by any of such Judges, for or against the judgment or determination appealed against.

Par. 9.

See par. 2 Orders of 13th June (*post*).

Evidence taken on commission in a proceeding connected with the suit, though not referred to in Court, may be included in the transcript : *Bucknell v. Vickery*, (1884) 5 N.S.W.R. Eq. 81 ; 1 W.N. 27.

The reasons to be sent are the reasons for the decision of the Court appealed from. Where an appeal was granted from a judgment of the Full Court reversing a decree of the Primary Judge in Equity, the appellant was not allowed to insert in the transcript the reasons given by the Primary Judge for his judgment : *Brown v. Patterson*, (1883) 4 N.S.W.R. Eq. 1A ; *Bucknell v. Vickery*, (1884) *ubi supra* ; *Stockton Coal Co. v. Fletcher*, (1888) 5 W.N. 29.

But in *McMahon v. Brewer*, (1897) 14 W.N. 52, *Manning, J.*, directed the judgment of the Judge of first instance to be printed with the transcript ; and said that the Privy Council had directed that that practice should be adopted in future, contrary to *Bucknell v. Vickery* (*supra*).

10. And We do further direct and ordain that the said Court shall in all cases of appeal to Us, Our Heirs or Successors conform to and execute or cause to be executed such judgments and orders as we shall think fit to make in the premises in such manner as any original judgment, decree, or decretal order, or other order or rule of the said Court of New South Wales, should or might have been executed.

By R. 214 (*post*) the appellant must within three months after judgment of the Privy Council deliver to the Prothonotary a printed copy of the transcript record and of the cases of the appellant and respondent.

The Court has no jurisdiction to alter the order of the Privy Council. Where the costs of the transcript were by the mistake of the English solicitors not included in the order, the Court could not direct payment of the costs : *Bucknell v. Vickery*, (1878) 1 S.C.R.N.S. Eq. 17.

The judgment of the Judicial Committee of the Privy Council is no part of the order. Where the order in general terms directed a new trial, but it appeared from the judgment of the Judicial Committee that on the new trial only one question was to be submitted to the jury, the plaintiff was not allowed to annex a copy of the judgment to the issue : *Hordern v. Commercial Union Assurance Co.*, (1887) 4 W.N. 64. In the same case on motion to make the order a rule of Court, an application by plaintiff that the judgment should be attached to and made part of the rule was refused ; but, *semble* that the Judge on the trial would be bound to confine the new trial within the limits indicated in the judgment of the Judicial Committee, S.C. (1887) 4 W.N. 100.

The Court here should make all orders consequential on the order of the Privy Council : *Rodger v. Comptoir d'Escompte*, L.R. 3 P.C. 465.

Costs ordered to be paid by order of the Privy Council will not be allowed to be paid by set-off of costs on proceedings in the same cause here : *Adams v. Young*, (1899) 20 N.S.W.R. 169 ; 15 W.N. 269 ; although costs on that motion here may be set-off against other costs in the action here : *Adams v. Young*, (1899) 20 N.S.W.R. 305 ; 16 W.N. 58.

Where an order of the Privy Council fixed a sum as costs of the appeal, this sum was not to be trebled, though otherwise treble costs were recovered : *Railton v. Wood*, (1890) 7 W.N. 64.

An order must be obtained giving leave to file the order of the Privy Council as of record in this Court ; and the costs of the motion may be taxed (though not mentioned in the order) as part of the costs of the appeal to the Privy Council : *Zobel v. Croudace*, (1899) 15 W.N. 239.

Par. 2.

ORDER IN COUNCIL (13 June, 1853).*

Whereas, &c. [reciting a report from the Judicial Committee of the Privy Council recommending the following Rules.]

HER MAJESTY, having taken the said report into consideration, was pleased, by and with the advice of Her Privy Council, to approve thereof, and of the Rules and Regulations set forth therein, in the words following, *videlicet* :

* * * *

Transcripts to
be sent to
Registrar of
Privy Council.

2. That the Registrar or other proper officer having the custody of records in any Court or special jurisdiction from which an appeal is brought to Her Majesty in Council be directed to send by post, with all possible dispatch, one certified copy of the transcript record in each cause to the Registrar of Her Majesty's Privy Council, Whitehall ;

And that all such transcripts be registered in the Privy Council Office, with the date of their arrival, the names of the parties, and the date of the sentence appealed from ;

And that such transcript be accompanied by a correct and complete index of all the papers, documents, and exhibits in the cause ;

And that the Registrar of the Court appealed from, or other proper officer of such Court, be directed to omit from such transcript all merely formal documents, provided such omission be stated and certified in the said index of papers ;

And that especial care be taken not to allow any document to be set forth more than once in such transcript ;

And that no other certified copies of the record be transmitted to agents in England by or on behalf of the parties in the suit ;

And that the fees and expenses incurred and paid for the preparation of such transcript be stated and certified upon it by the Registrar or other officer preparing the same. (a)

(a) See cases cited in note to par. 9 of Orders of 13th Nov., 1850 (*ante*).

Where it was probable that a question would arise between respondents to an appeal in the event of the appellant being successful, evidence admitted only between respondents might be printed in the transcript and not in a separate transcript but at respondent's expense : *McMahon v. Brewer*, (1897) 14 W.N. 52.

Transcripts
may be
printed abroad.

3. That when the record of proceedings or evidence in the cause appealed has been printed or partly printed abroad, the Registrar or other proper officer of the Court from which the appeal is brought shall be bound to send home the same in a printed form, either wholly or so far as the same may have been printed, and that he do certify the same to be correct, on two copies, by signing his name on every printed sheet, and by affixing the seal, if any, of the Court appealed from to these copies, with the sanction of the Court.

And that in all cases in which the parties in appeals shall think fit to have the proceedings printed abroad, they shall be at liberty to do so, provided they cause fifty copies of the same

* From *Gazette* of 22nd November 1853.

to be printed in folio, and transmitted, at their expense, to the Registrar of the Privy Council, two of which printed copies shall be certified as above by the officers of the Court appealed from ; and in this case no further expense for copying or printing the record will be incurred or allowed in England.

Par. 3.

• • • • •
See *Broken Hill Proprietary Co. v. Municipal District of Broken Hill*, (1901) 18 W.N. 212.

5. That a certain time be fixed within which it shall be the duty of the Appellant or his agent to make such application for the printing of the transcript, and that such time be within the space of six calendar months from the arrival of the transcript and the registration thereof in all matters brought by appeal from Her Majesty's colonies and plantations east of the Cape of Good Hope or from the territories of the East India Company, and within the space of three months in all matters brought by appeal from any other part of Her Majesty's dominions abroad : and that in default of the Appellant or his agent taking effectual steps for the prosecution of the Appeal within such time or times respectively, the Appeal shall stand dismissed without further order, and that a report of the same be made to the Judicial Committee by the Registrar of the Privy Council at their Lordship's next sitting.

Transcripts to be printed within a certain time.

6. • • • • And HER MAJESTY is further pleased to order, and it is hereby ordered, that the foregoing Rules and Regulations be punctually observed, obeyed, and carried into execution in all Appeals or petitions and complaints in the nature of Appeals brought to Her Majesty, or to Her heirs and successors, in Council, from Her Majesty's colonies and plantations abroad, and from the Channel Islands or the Isle of Man, and from the territories of the East India Company, whether the same be from Courts of justice or from special jurisdictions, other than appeals from Her Majesty's Courts of Vice-Admiralty, to which the said rules are not to be applied.

Whereof the Judges and officers of Her Majesty's Courts of Justice abroad, and the Judges and officers of the Superior Courts of the East India Company, and all other persons whom it may concern, are to take notice, and govern themselves accordingly.

SHERIFF ACT 1900.

THIS Act consolidates the whole or parts of the following Acts :—

5 Vic. No. 4 ;
7 Vic. No. 13 ;
11 Vic. No. 20 ;
50 Vic. No. 31 ;

TABLE

Showing how the sections of Acts consolidated have been dealt with.

Section of Repealed Act.	Section of Consolidated Act.	Remarks.
5 Vic. No. 4, s. 11 ..	13-17	
7 Vic. No. 13, s. 1 ..	3	As to appointment, see Constitution Act, s. 37
2	10-12	
3	.....	Omitted. To be dealt with in Creditors' Remedies Bill.
4	.....	Consolidated in Landlord and Tenant Act of 1899. See ss. 40 and 42.
5	4-6	
6	7	
7	.....	Omitted. To be dealt with in Interpleader Bill.
8	.....	Omitted as obsolete.
11 Vic. No. 20, s. 37 ..	8	The unrepealed part of the section to be dealt with in the Jury Bill.
50 Vic. No. 31, s. 1 ..	9	
2	.....	Omitted. Short title.

ACT No. XVI., 1900.

An Act to consolidate the enactments relating to the office of Sheriff. [Assented to, 22nd September, 1900.]

BE it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and Legislative Assembly of New South Wales, in Parliament assembled, and by the authority of the same, as follows :—

PART I.

PRELIMINARY.

1. This Act may be cited as the "Sheriff Act, 1900," and is divided into Parts, as follows :—

PART I.—PRELIMINARY—ss. 1, 2.

PART II.—THE SHERIFF—ss. 3-9.

PART III.—SPECIAL BAILIFFS—ss. 10-12.

PART IV.—DISTRICT SHERIFFS—ss. 13-17.

Short title and division.

2. (1) The Acts mentioned in the Schedule to this Act are to the extent therein expressed hereby repealed. **S. 2.**

(2) Every person appointed under any enactment hereby repealed and holding office at the time of the passing of this Act shall be deemed to have been appointed hereunder. Repeal and savings.

(3) Every bond and recognisance entered into under any enactment hereby repealed and in force at the time of the passing of this Act shall be deemed to have been entered into hereunder.

(4) Every scale of fees fixed under any enactment hereby repealed and in force at the time of the passing of this Act shall be deemed to have been fixed hereunder.

See the Scale of Fees printed *post*, at the end of this Act.

PART II.

THE SHERIFF.

3. The office of sheriff shall be holden during pleasure. Tenure of office.

The earliest enactment dealing with the appointment and duties of the Sheriff is the Charter of Justice in its sections 11, 12, and 13; these provisions were amended by Act of Council 7 Vic. No. 13 which is one of the Acts consolidated by the present Statute. See the clauses of the Charter of Justice, (*post*). 7 Vic. No. 13, s. 1.

By clause 11 of the Charter, the Sheriff was to be appointed by the Governor for one year only. The appointment is now made under this Act, and the consolidated Act 7 Vic. No. 13, s. 1, during pleasure. And by s. 37 of the Constitution Act the appointment of all officers (except those liable to retire on political grounds) is made by the Governor with the advice of the Executive Council.

As to the position of the Sheriff in this State, see *Brassey v. Maclean*, (1874) 12 S.C.R. 206; on appeal L.R. 6 P.C. 398, and cases cited under s. 12 (*post*).

4. The sheriff shall from time to time procure and give such security by bond or recognisance to Her Majesty, by himself and such sureties and in such reasonable sum or sums respectively as Her Majesty may require, conditioned for the collection and for the payment over by him to the Colonial Treasurer of all moneys which shall come to his hands by virtue of his office of sheriff and which should be paid over to the said Treasurer. Bond by sheriff for due execution of his office. Ibid. s. 5.

5. In case of non-payment, Her Majesty may put the said bond or recognisance in suit and enforce the same by extent as in any ordinary case of debt by recognisance due to the Crown. Enforcement of bond. Ibid.

6. (1) No surety for the sheriff shall be liable beyond the separate amount in which he has become bound for himself. Limitation of liability of surety. Ibid.

(2) Every such surety may withdraw from any liability for the future under any such bond or recognisance by giving to the Attorney-General three months' notice in writing of his intended withdrawal, without prejudice nevertheless to any previous breach of the condition of such bond or recognisance.

7. (1) On the first Monday in every month a return shall be made by the sheriff to the Governor of all fines which during the preceding month the sheriff has been ordered by the Judges Monthly return of fines. Ibid. s. 6.

S. 7. of the Supreme Court to collect, or which it may otherwise be his duty to collect.

(2) Such return shall show—

- (a) whether such fines have been collected or not, and
- (b) the whole amount which at the time of making the return remains due to the sheriff on account of fines, with the name of the party or parties from whom such amount is owing.

Sheriff or his deputy to attend Courts.

11 Vic. No. 20, s. 37.

8. The sheriff shall by himself or his deputy be in attendance upon the Supreme Court, Circuit Courts, and Courts of Quarter Sessions during every sitting of the said Courts; and in every case of non-attendance upon any of the said Courts shall be liable to a fine not exceeding fifty pounds to be summarily imposed at the discretion of such Court for such non-attendance.

Deputy.—The Sheriff himself appoints his deputies to attend those Courts at which he is unable to be personally present.

Fees.

50 Vic. No. 31:

9. The Governor may, from time to time, fix the scale of fees to be chargeable in the sheriff's office in respect of all matters pending at any time in the Supreme Court.

See Scale, printed (*post*), at the end of this Act.

See *In re Mitchell*, (1889) 10 N.S.W.R. 111; 5 W.N. 129; *In re G. J. Sly*, (1890) 11 N.S.W.R. 39; 6 W.N. 141; *In re Creagh and Williams*, (1890) 11 N.S.W.R. 16; 6 W.N. 141; *Gardiner v. Orr*, (1894) 10 W.N. 193; *In re Mimna*, (1896) 13 W.N. 25.

PART III.

SPECIAL BAILIFFS.

Powers of Court under Charter may be exercised by a Judge.

7 Vic. No. 13, s. 2.

10. (1) In all cases in which according to the terms of the Charter of Justice the Supreme Court is authorised to name and appoint some person other than the sheriff to whom the process of the said Court shall be directed, such nomination and appointment may be made by any Judge of the said Court.

(2) In like manner in cases where, notwithstanding the direction of any such process to the sheriff, the said Court is by the said Charter required to direct by what person and in what manner such process shall be executed, such direction may be given and all orders in respect thereof be made by any Judge of the said Court.

(3) The process may in any such last-mentioned case, if the Judge sees fit, be directed to such person instead of the sheriff.

In all cases in which according to the terms of the Charter of Justice, etc.—By clause 12 of the Charter of Justice (*post*) the Court was authorised to appoint some other person to execute and return process, in cases where the sheriff was interested.

Sub-s. 2.—By clause 13 of the Charter (*post*) the Court was empowered to fix limits beyond which the sheriff was not compellable to go and execute process; and in such case the Court directed a special bailiff to be appointed.

Fees.

Ibid.

11. In any such case the fees paid in ordinary cases to the sheriff by the person against whom such process is sued out shall be due and payable to the person suing out such process, except the fees for registering the warrant and returning the same.

The proviso in 7 Vic. No. 13, s. 2, for which this section is substituted, ran as follows :—" Provided always that in any such case the fees paid by the defendant in ordinary cases to the Sheriff shall be due and payable to the plaintiff except the fees for registering the warrant and returning the same." The real meaning has been made clear by changing the words " plaintiff " and " defendant " into " the person suing out such process " and the " person against whom such process is sued out " respectively.—(*Commissioner's Note.*)

S. 11.

12. In any such case the sheriff, although the process may be in fact directed to him, shall not be responsible for any act done under or in respect of such process or by colour thereof ; but the person aggrieved by any such act shall have the same remedy and right of action against—

Sheriff relieved from responsibility.
7 Vic. No. 13.
s. 2.

- (a) the person to whom the process was directed, or the person appointed to execute the same, as the case may be, or
 - (b) the person suing out the process, or
 - (c) both such persons, separately or jointly,
- as the person aggrieved would have had against the sheriff if such process had been directed to that officer and the act complained of had been done by him.

The sheriff shall not be responsible.—See '*Matthews v. Ogg*, (1864) 3 S.C.R. 1 ; *Murphy v. Goldman*, (1886) 3 W.N. 23 ; 7 N.S.W.R. 334 ; and see also *Clarke v. Cowper*, (1889) 10 N.S.W.R. 106, where *semble* an action of trespass will not lie against the Sheriff, who has handed over to a successful plaintiff in an action of ejectment more than such plaintiff is entitled to.

The person aggrieved by any such act shall have the same remedy, etc.—For a very full discussion and statement of the position and liability of the Sheriff in N.S.W., see the case of *Brasyer v. Maclean*, (1874) 12 S.C.R. 206, reversed on appeal, L.R. 6 P.C. 398. See also *Barclay against Manby* ; *Pennington against Manby*, (1862) 1 S.C.R. 352 ; *Roberts v. Johnston*, (1893) 14 N.S.W.R. 426.

PART IV.

DISTRICT SHERIFFS.

13. (1) The Governor may by warrant under his hand and seal nominate and appoint a fit and proper person to act as and be the sheriff in and for any circuit district.

Appointment.
5 Vic. No. 4, s.11

(2) The Governor may, on the first Monday in every succeeding year, nominate and appoint in manner aforesaid the same or some other fit and proper person to act as and be the sheriff for such district for the year next following.

Appointments after first year.
Ibid.

14. Every person so appointed shall as soon as conveniently may be take before a Judge of the Supreme Court the oath of allegiance and an oath faithfully to execute his office.

Oaths to be taken.
Ibid.

15. (1) The sheriff first so appointed shall continue in office until he is re-appointed or another person is appointed and sworn into office in his stead.

Tenure of office.
Ibid.

(2) Every sheriff afterwards so appointed shall continue in office during the space of one whole year then next following and until he is re-appointed or another person is appointed and sworn into office in his stead.

Tenure of office.
Ibid.

S. 16.

Death or
incapacity of
district sheriff.
Ibid.

5 Vic. No. 4,
s. 11.

16. (1) If the sheriff for any circuit district dies or departs from New South Wales or becomes otherwise incapable of executing the duties of his office, another person shall be appointed and sworn in like manner.

(2) Such person shall continue in office for the remainder of the year and until he is re-appointed or another person is appointed and sworn into office in his stead.

Powers, duties,
privileges, and
liabilities.
Ibid.

17. The sheriff for any circuit district during the time of his continuance in office shall in and for such district have and execute the same powers and duties and enjoy the same privileges and be subject to the same liabilities in all respects as by law belong to the office of a sheriff; and the powers, duties, privileges and liabilities of the Sheriff of New South Wales shall within such district cease and determine.

SCHEDULE.

Reference to Acts.	Title or Short Title.	Extent of repeal.
5 Vic. No. 4..	An Act to make further provision for the trial of cases in the Circuit Court of New South Wales, and to amend in certain respects the Act providing for trial by jury in such Courts.	Section 11.
7 Vic. No. 13..	An Act for regulating the appointment and duties of sheriff in New South Wales.	All the unrepealed part, except sections 3 and 7.
11 Vic. No. 20..	An Act to consolidate and amend the laws relative to jurors and juries in New South Wales.	Part of section 37 down to and including the words "such non-attendance."
50 Vic. No. 31..	Sheriffs' Fees Act, 1887	The whole.

Sydney, 26th May, 1887.

IT is hereby notified for, general information, that His Excellency the Governor, with the advice of the Executive Council, has been pleased to approve of the following Scale of Fees to be charged in the Sheriff's Office, under the provisions of the "Sheriff's Fees Act 1887."

WILLIAM CLARKE.

SCALE OF FEES to be charged in the Sheriff's Office.

<i>Office Fees.</i>	£ s. d.
Service of summons or other process unspecified herein (each defendant)	0 5 0
Caption of any defendant under <i>ca. re.</i>	0 10 6
Service of foreign attachment, each garnishee	0 5 0
Every bail bond.. .. .	0 5 0
Assignment of bail bond	0 5 0
Receiving and entering every writ of execution	0 1 0
On every warrant	0 1 0
The like to any special bailiff	0 2 6
Office copy of any document, per folio of 72 words	0 0 4
On every search or inspection of any document in each suit	0 1 0
Drawing every advertisement and inserting same	0 5 0
On every warrant in replevin	0 5 0
Executing process of attachment.. .. .	0 10 6

	£	s.	d.	Schd.
Poundage on executing every writ of <i>fi. fa.</i> , <i>ca. sa.</i> , or Judge's warrant, viz., £5 per cent. on first £100, and 2½ per cent. above that sum.				
The like on <i>ha. fa.</i> , the same rate of fee on rent or annual value.				
To cover postage, each summons, writ, or other process sent by post ..	0	0	6	
Certifying office copy of any writ	0	1	0	

Sheriff's Fees.

Attending a view within five miles of Sheriff's Office	1	1	0
Attending a view at a greater distance	2	2	0
Attending on every inquisition as to property, lunacy, or otherwise ..	1	1	0
Mileage to Sheriff, per mile (both going and coming)	0	0	9
Every copy of a civil jury panel	0	5	0
Settling and executing (including drawing if required) every deed of transfer	1	1	0
Keeping office open after hours	1	1	0

Officers' Fees.

Executing any warrant on <i>ca. sa.</i> , or <i>ca. re.</i> , or <i>ha. fa.</i> , or attachment in insolvency, or otherwise	1	1	0
Ditto on <i>fi. fa.</i> when the amount to be levied exceeds £50	1	1	0
Ditto when the amount to be levied or received under the warrant does not exceed £50	0	10	6
Service of summons or other process, each defendant served ..	0	5	0
Mileage on service of summons or executing any warrant or process, each time, per mile	0	1	0
The like where two summonses, warrants, or processes are served or executed at same time on same defendant, each summons, each time, per mile	0	0	6
The like where more than two summonses, &c., each time, per mile ..	0	0	4
Possession fee, each man, per diem	0	8	0
Mileage to keeper or keepers, each man, each time, per mile ..	0	1	0
For each man required to execute a warrant of ejectionment, per diem ..	0	8	0
Mileage, each man, for executing same or any process as a messenger in insolvency, per mile	0	1	0
Mileage in conveying party to gaol, each man, per mile	0	1	0
Accepting bail bond under £200 (to be paid by defendant)	1	0	0
Above that sum, for every £100 or part thereof (to be paid by defendant)	0	10	0
For every sale where amount received is under £100	1	0	0
Above that sum, for every £100 or part thereof	0	10	0
Making inventory and copy in an insolvent estate	0	10	6
Return of <i>non est inventus</i>	0	5	0
Delivering goods in replevin	1	1	0

Expenses and Sums.

Advertising	} The amount actually and reasonably incurred.			
Meals for Keeper				
Removal of party arrested to gaol				
Live stock levied upon—cost of keep				
Necessary assistance to officer in the execution of any writ. .				
Appraiser, where the sum demanded and due in replevin does not exceed £50 for appraisement and affidavit of value		1	1	0
Appraiser, where it exceeds £50		1	10	0
Travelling expenses of appraiser, and in cases where the before-men- tioned rates are found insufficient, mileage each way		0	1	0

S. 1.

SUPREME COURT PROCEDURE ACT 1900.

ACT No. XLIX., 1900.

An Act to amend the procedure of the Supreme Court.
[Assented to, 14th November, 1900.]

BE it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and Legislative Assembly of New South Wales in Parliament assembled, and by the authority of the same, as follows : —

Short title.

1. This Act may be cited as the "Supreme Court Procedure Act, 1900."

Interpretation,

2. In the interpretation of this Act, unless the context otherwise indicates or requires, the following words shall have the respective meanings set opposite to them, that is to say :—

" Court."

" The Court " means Supreme Court.

" Judge."

" Judge " means Judge of the Supreme Court.

" Action."

" Action " means action in the Supreme Court.

" Prescribed."

" Prescribed " means prescribed by rules of Court.

Parties may consent to dispense with a jury.

3. (1) In any action by consent of both parties the whole or any one or more of the issues of fact in question may be tried, or the amount of any damages or compensation may be assessed by a Judge without a jury.

(2) Notwithstanding such consent a Judge may at any time order that all or any of the issues of fact in an action be tried with a jury if it appears to him to be expedient.

Issues under the Real Property Act may be tried by a Judge without a jury.

4. Issues of fact settled under the provisions of the Real Property Act, 1900, may by consent of both parties be tried by a Judge without a jury, and a Judge when so sitting shall have all the powers of a jury.

Finding of Judge to be finding of a jury.

5. The verdict or finding of any Judge sitting without a jury on the trial or assessment of any issue of fact or amount of damages or compensation pursuant to this Act shall be of the like force and effect in all respects as the verdict or finding of a jury.

6. In all cases in which the Real Property Act, 1900, directs applications to be made to the Supreme Court, such applications may be made to the Supreme Court in its equitable jurisdiction, as well as to the Supreme Court holden before three Judges.

S. 6.

Applications to the Court under the Real Property Act may be made to the Equity Court.

7. (1) In any action, if the Court in Banco is of opinion that the plaintiff should have been non-suited, or that upon the evidence the plaintiff or the defendant is as a matter of law entitled to a verdict in the action or upon any issue therein, the Court may order a nonsuit or such verdict to be entered.

Full Court may order nonsuit or verdict to be entered.

(2) If the Court in Banco orders a new trial of any action, issue, or question which has been tried before a Judge without a jury, it may direct such new trial to be heard before a Judge either with or without a jury.

The Court may order a nonsuit or such verdict to be entered.—The Court will not, except under special circumstances, exercise this power where the verdict has been for a small amount. Where the amount involved was only £6 10s., the Court refused to grant a new trial or enter a verdict under the powers conferred by this section: *Helmore v. Simons*, (1902) 19 W.N. 25.

Where there are several counts in a declaration, and there has been a general verdict, and it is impossible to tell on which count the jury have given damages, then when there is no evidence to support one of the counts, there must be a new trial: *Lamb v. West*, (1894) 15 N.S.W.R. 120; 10 W.N. 209; but where the case under each count is identical and the damages given are the same under whatever count they may be given, the Court has the power under this section to allow the verdict to stand on one or more of the counts and to enter it for the plaintiff or defendant as the case may be on the other or others: *Hodge v. Rudd*, (1902) 19 W.N. 119.

Where, on a motion for new trial the Court was of opinion that the defendant was entitled to succeed upon a point of law which had not been raised at the trial, or taken in the rule *nisi*, the rule was amended, by adding the ground, and the verdict entered for the defendant: *Trafford v. Pharmacy Board*, (1902) 19 W.N. 281.

8. In every action in which the defendant has pleaded by way of set-off or cross-action any debt or demand claimed by him from the plaintiff, such defendant shall be entitled to recover in such action the amount by which such debt or demand is found to exceed the debt or demand proved by the plaintiff, and shall have judgment and execution for the same accordingly.

Defendant may have judgment for excess of set-off.

As to form of plea of set-off where an excess is claimed, see *Pearse v. Trenchard*, (1901) 18 W.N. 135.

9. Under section one hundred and eighty-eight, section one hundred and ninety-one, and section one hundred and ninety-four of the Common Law Procedure Act, 1899, the cause of action shall be deemed to have arisen within the jurisdiction in the case of an action arising out of contract if either—

Foreign attachment against absent defendant.

- (a) the contract was made within the jurisdiction, or
- (b) the breach thereof was made or committed within the jurisdiction wherever the contract was made.

See the sections mentioned, and notes thereto.

Sections 10 and 11 and the Schedule, except Rule 1 thereof are repealed by the Equity Act, 1901.

RULES OF COURT.

12. The rules and form in the Schedule to this Act shall regulate the practice and procedure hereunder in all matters to which they relate, except so far as they shall hereafter be

Rules of Court.

altered, added to, or rescinded under the power to make rules herein contained.

Judges to make rules.

13. Rules of Court regulating the practice and procedure under this Act shall be made by the Judges of the Supreme Court, or any three of them, and such rules may rescind, add to, or alter any of the rules or form contained in the Schedule to this Act, and when so made such rules shall have the same force and effect as if they had formed part of the Schedule to this Act.

Judges to make rules relating to procedure in the Court generally.

14. The Judges of the Court or any three of them may make rules of Court for all or any of the following purposes, that is to say :—

- (a) For the purpose of regulating the manner in which applications to the Court under any statute may be made, and the practice and procedure to be observed upon any such application.
- (b) For the purpose of providing for the verification on oath of all pleas filed in actions arising under a writ specially endorsed under the twenty-fourth section of the Common Law Procedure Act, 1899.
- (c) For the purpose of regulating the sittings of the Court and of the Judges thereof sitting in Chambers, and for the distribution among the Judges of the business of the Court.
- (d) And generally for the purpose of regulating the practice and procedure of the Court.

Rules not to affect certain matters.

15. Nothing in any rules of Court to be made under this Act shall effect the mode of giving evidence by the oral examination of witnesses in trials by jury, or the rules of evidence, or the law relating to juriesmen or juries.

Non compliance with rules.

16. Non-compliance with any of the rules of Court in the Schedule to this Act, or made under the authority of this Act, shall not render any proceeding void unless the Court or a Judge thereof so directs, but such proceedings may be set aside either wholly or in part as irregular, or amended or otherwise dealt with in such manner and upon such terms (if any) as appear to be just.

Rules to be laid before Parliament, who may disallow them.

17. All rules of Court made under the powers herein contained shall, immediately after the making thereof, be laid before both Houses of Parliament if then sitting, or if not within ten days of the next sitting thereof; and if either of the said Houses, by any resolution passed within thirty days after such rules have been so laid before it, resolves that any such rule or any part thereof ought not to continue in force, then such rule or part shall immediately cease to be binding.

SCHEDULE.

RULES OF COURT.

Appeals from decisions of a single Judge.

Appeals from Judge on point of law.

1. Appeals from the decision of a single Judge upon any question of law to the Full Court shall be made and prosecuted in the same times and manner in all respects as appeals to the Full Court in the Common Law jurisdiction of the Court from a Judge sitting in chambers.

SUPREME COURT AND CIRCUIT COURT ACT 1900.

TABLE

Showing how the sections of Acts consolidated have been dealt with.

Section of Repealed Acts.	Section of Consolidated Act.	Remarks.
6 Will. IV, No. 12, s. 1	16	
4 Vic. No. 22, ss. 1-3	.....	Practically repealed by 28 Vic. No. 7, s. 5.
4-9	.....	Repealed by 6 Vic. No. 4.
10	.....	To be dealt with in another Bill.
11	.....	Repealed by 6 Vic. No. 4.
12	.....	To be dealt with in another Bill.
13	.....	Obsolete.
14	.....	Repealed by Witnesses Examination Act.
15	.....	Part repealed by Common Law Procedure Act, 1899; remainder to be dealt with in another Bill.
16	23	
17	24-29, 31	
18	32	
19	17	
20-21	.....	Repealed by 44 Vic. No. 18.
22	.....	To be dealt with in Equity Bill.
23	39, 40	
24	.....	Obsolete.
25	.....	Obsolete.
26	.....	Repealed by Common Law Procedure Act, 1899.
27	20	
28	.....	Part repealed by Common Law Procedure Act, 1899; remainder to be dealt with in another Bill.
5 Vic. No. 4, s. 1	22, 26	
2	28, 30	
10	29	
5 Vic. No. 9, ss. 1-11	.....	Obsolete.
15 Vic. No. 17, s. 1	39	
2	.....	Omitted. See Audit Act, 1898, No. 5.
3	.....	Omitted. See Wills, Probate and Administration Act, 1898, s. 154.
17 Vic. No. 12, s. 1	.....	Omitted. See Audit Act, 1898, No. 5.
Constitution Act, s. 38	10	
39	10	
40	11	
51	12	
22 Vic. No. 14, s. 4, 5	.....	Obsolete.
6	.....	Part repealed by Lunacy Act of 1898; remainder obsolete.

Supreme Court and Circuit Court Act.

S. 1.

Section of Repealed Acts.	Section of Consolidated Act.	Remarks.
22 Vic. No. 14, s. 7	19	The unrepealed part to be dealt with in Justice's Bill.
25 Vic. No. 9, s. 1	5, 9	
28 Vic. No. 7, s. 1	9	The unrepealed part to be dealt with in Equity Bill.
2	9	
3	10	Superseded by 46 Vic. No. 15. Repealing section.
4	.....	
5	.....	
36 Vic. No. 9, s. 3	7	
4	15	
44 Vic. No. 18, s. 1	6	
2	15	
45 Vic. No. 1, s. 1	9	Superseded by 46 Vic. No. 15.
2, 3	.....	
4	10	
5	17, 18	
46 Vic. No. 15, s. 1	11	
2	12	
3	12	
4	.....	
46 Vic. No. 17, s. 359	33	Short title.
46 Vic. No. 19, ss. 1, 2	.....	Spent.
48 Vic. No. 3, s. 2	15	
48 Vic. No. 13, ss. 1-3	18	
50 Vic. No. 35, s. 1	9	
2	11	
3	12	
4	10	
5	.....	
50 Vic. No. 36, s. 1	15	Short title.
51 Vic. No. 19, s. 128	9, 10, 11, 12	The proviso as to the Chief Commissioner is spent.
129	14, 15	
135	9, 18	
55 Vic. No. 3, s. 1	2	Partly dealt with in Bankruptcy Act, 1898, s. 138.
2	21	
3	.....	
4	.....	
55 Vic. No. 26, s. 1	.....	Saving clause.
2	.....	Short title.
3	13	Short title.
4	.....	To be dealt with in land Bill.
60 Vic. No. 19, s. 1	.....	To be dealt with in Equity Bill.
2	39	Repealing section.
3	34	
4	35	
5	36	
6	37, 38	
7	.....	Short title.

ACT No. XXXV., 1900.

S. 1.

An Act to consolidate certain enactments relating to the Supreme Court and Circuit Courts. [Assented to, 19th October, 1900.]

BE it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and Legislative Assembly of New South Wales in Parliament assembled, and by the authority of the same, as follows :—

PART I.

PRELIMINARY.

1. This Act may be cited as the "Supreme Court and Circuit Courts Act, 1900," and is divided into Parts, as follows :— Short title and division.

PART I.—PRELIMINARY—ss. 1-3.

PART II.—THE JUDGES—ss. 4-15.

PART III.—JURISDICTION OF THE COURT, AND HOW EXERCISED—ss. 16-21.

PART IV.—CIRCUIT COURTS—ss. 22-33.

PART V.—COURT FEES—ss. 34-38.

PART VI.—RULES—ss. 39-41.

2. (1) The Acts mentioned in the Schedule to this Act are to the extent therein expressed hereby repealed. Repeal. Schedule.

(2) All persons appointed under any enactment hereby repealed, and holding office at the time of the passing of this Act, shall be deemed to have been appointed hereunder. Officers under repealed Acts.

(3) All commissions issued, and all proclamations, notices, rules, orders, and regulations made or given under the authority of any enactment hereby repealed, and being in force at the time of the passing of this Act, shall continue in force and have the same effect and validity as if they had been issued, made, or given under the authority of this Act. Commissions, proclamations, rules, &c., under repealed Acts.

(4) Nothing herein shall affect the validity of any judgment, decision, order, act, proceeding, or matter rendered or declared valid by any enactment hereby repealed. Validation of proceedings saved. 55 Vic. No. 8, s. 1.

(5) Nothing in this act shall be construed to take away, lessen, or impair any statutory or other jurisdiction, power, authority, right, or privilege of the Court or of any Judge, or of any Circuit Court. Jurisdiction of Courts and Judges saved.

Subsection (5) has been inserted for more abundant caution.—(*Commissioner's Note.*)

3. In this Act, unless the context or subject-matter otherwise indicates or requires :— Interpretation.

"Barrister" means a barrister admitted by the Court, or a barrister of England or Ireland.

"Chief Justice" means Chief Justice of the Court.

"Judge" means Judge of the Court, and includes the Chief Justice.

"The Court" means the Supreme Court of New South Wales.

S. 4.

PART II.

THE JUDGES.

Appointment, qualification, and tenure of office.

Present Judges
to retain office:

4. (1) The present Chief Justice and other Judges shall continue to be the Chief Justice and Judges respectively.

(2) The present Chief Judge in Equity, Judge exercising the Matrimonial Causes Jurisdiction of the Court, Judge in Bankruptcy, and Probate Judge shall continue to be the Chief Judge in Equity, the Judge exercising the Matrimonial Causes jurisdiction of the Court, the Judge in Bankruptcy, and the Probate Judge respectively.

Qualification
for office of
Chief Justice.

25 Vic. No. 9,
s. 1.

5. The office of Chief Justice may be held by a barrister admitted by the Court in like manner and subject to the like qualifications as to standing at the bar as if he were a barrister of England or Ireland.

The provisions as to the appointment of the Chief Justice are not consolidated in this Act, as they appear in the Charter of Justice, which, being granted under an Imperial Statute, did not come within the Commission for Consolidation.—(*Commissioner's Note.*)

Appointment of
Chief Judge in
Equity.

44 Vic. No. 18,
s. 1.

6. Whenever the office of Chief Judge in Equity becomes vacant, the Governor may appoint one of the Judges to such office.

55 Vic. No. 26,
s. 4.

Appointment of
Judge exercising
Matrimonial
Causes Juris-
diction.

36 Vic. No. 9,
s. 3.

7. Whenever the office of Judge exercising the Matrimonial Causes Jurisdiction of the Court becomes vacant, the Governor may appoint the Chief Justice, or if he declines such appointment, then one of the other Judges, to such office.

Appointment of
Probate Judge.
[cf. 1898, No. 13
s. 33.]

8. Whenever the office of Probate Judge becomes vacant, the Governor may appoint one of the Judges permanently or temporarily to such office.

Appointment of
Judge in
Bankruptcy
and of Puisne
Judges
generally.

28 Vic. No. 7,
s. 1.

45 Vic. No. 1,
s. 1.

50 Vic. No. 35,
s. 1.

51 Vic. No. 19,
s. 128.

9. (1) Whenever—

(a) the office of Judge in Bankruptcy becomes vacant ; or

(b) through the office of any other Puisne Judge becoming vacant, the number of Puisne Judges is less than six,

the Governor may, by Commission under the Great Seal, in Her Majesty's name, appoint a fit and proper person to such office.

(2) Such person shall, from the time of his appointment, be a Judge to all intents and purposes whatsoever, and may, subject to the provisions of this or any other Act, sit as such in any jurisdiction of the Court.

Qualification of
such Judges.

25 Vic. No. 9,
s. 1.

28 Vic. No. 7,
s. 2.

45 Vic. No. 1,
s. 1.

50 Vic. No. 35,
s. 1.

51 Vic. No. 19,
ss. 128, 135.

(3) Such person shall be a barrister of not less than five years standing, or, if he be appointed to the office of Judge in Bankruptcy, shall be such barrister or a solicitor of not less than seven years standing : But this subsection shall not apply to a person appointed in succession to any present Judge who has been appointed under the provisions of the Act forty-fifth Victoria number one, or of the Act fiftieth Victoria number thirty-five.

But this subsection, &c.—The first of these Acts made provision for the appointment of a fourth and the second of a fifth Puisne Judge by the appointment of any person, "whether a barrister or not,"

10. (1) The commission of every Judge shall be, continue, and remain in force during his good behaviour, notwithstanding the demise of Her Majesty, whom may God long preserve. **S. 10.**

(2) Provided that Her Majesty may remove any Judge upon the address of both houses of the legislature.

Tenure of office.
Constitution
Act ss. 38, 39.
28 Vic. No. 7,
s. 3.
45 Vic. No. 1,
s. 4.
50 Vic. No. 35,
s. 4.
51 Vic. No. 19,
s. 128 (3).

Salaries and pensions.

11. (1) The annual salary of the Chief Justice shall be three thousand five hundred pounds, and the annual salary of every Puisne Judge shall be two thousand six hundred pounds.

(2) Such salary shall be paid to such Chief Justice or Puisne Judge so long as his patent or commission continues and remains in force.

Salary.
Constitution
Act, s. 40.
46 Vic. No. 15,
s. 1.
50 Vic. No. 35,
s. 2.
51 Vic. No. 19,
s. 128 (4).

12. (1) The pension to be paid to a Chief Justice or Puisne Judge retiring after fifteen years' service in New South Wales as a Judge, or on permanent disability or infirmity, shall be seven-tenths of his actual salary at the time of such retirement.

(2) Every such pension shall be in every year charged upon and payable out of the Consolidated Revenue Fund.

(3) If, after the assignment of such pension to a Judge, he accepts any new appointment under the Crown, such pension shall merge or be reduced *pro tanto* during the tenure of such appointment according as the salary or emoluments of such appointment are of a greater or less amount than such pension.

Pension.
46 Vic. No. 15,
ss. 2, 3.
50 Vic. No. 35,
s. 3.
51 Vic. No. 19,
s. 128 (4).

Acting Judges.

13. (1) The Governor may issue a special commission to any Judge of the District Court, or to any barrister or solicitor of not less than seven years' standing, appointing him—

(a) to act as a Judge of the Court for the trial of issues, civil or criminal, at any Circuit Court, or Court of Gaol delivery, or at any place or places at which a Judge of the Court could not attend without detriment to the ordinary business of the Court; or

(b) to sit and act as a Judge of the Court of Sydney in any one or more jurisdictions of the Court to be specified in such commission, and for a time not exceeding in any case six months to be specified in like manner.

(2) Thereupon the person so appointed shall, at the place and for the time and subject to the conditions or limitations specified in such commission, have all the power, authorities, privileges, and immunities, and fulfil all the duties of a Judge of the Court.

Sit and act.—In the original section the words were "sit or act."

Not exceeding in any case six months.—This provision has been taken to apply to appointments under (b) only.—(*Commissioner's Note.*)

14. (1) Upon leave of absence being granted to the Judge in Bankruptcy, the Governor may appoint an acting Judge in Bankruptcy during such leave of absence.

General power
to appoint
acting Judge.
55 Vic. No. 26,
s. 3.

Acting Judge
in Bankruptcy.
51 Vic. No. 19,
s. 129.

S. 14.

(2) Thereupon such acting Judge shall have and exercise the same jurisdiction, powers, authorities, and privileges, as the Judge in Bankruptcy.

Judge in bankruptcy.—In the original section the words were “Court in Bankruptcy.” The jurisdiction of the Court in Bankruptcy (which is a phrase not defined in the Bankruptcy Act) is exercised by the Judge in Bankruptcy.—(*Commissioner's Note.*)

Acting Judges
in special juris-
dictions.

36 Vic. No. 9,

s. 4.

44 Vic. No. 18,

s. 2.

48 Vic. No. 3,

s. 2.

50 Vic. No. 36,

s. 1.

51 Vic. No. 19.

s. 129.

54 Vic. No. 25,

s. 4.

15. Where under any Act any jurisdiction, power, or authority is vested in the Chief Judge in Equity, the Judge exercising the Matrimonial Causes Jurisdiction of the Court, the Judge in Bankruptcy, or the Probate Judge, then—

(a) at the request of such Judge or of the Chief Justice ; or
(b) during the illness of such Judge or his absence from Sydney ; or

(c) for any other reasonable cause,
any other Judge may exercise such jurisdiction, power, or authority in all respects as such Judge in whom the same is so vested might have done, and shall while so acting have co-ordinate jurisdiction with and all the power and authority of such Judge, subject to the same right of appeal.

This clause blends the various provisions of the sections mentioned in the margin of the clause. The attached table shows the variations in their wording.—(*Commissioner's Note.*)

Draper of Sections Consolidated in Clause 15.

36 Vio. No. 9, s. 4, and 48 Vio. No. 3, s. 2.	44 Vio. No. 18, s. 2.	50 Vio. No. 36, s. 1.	51 Vio. No. 19, s. 129.	54 Vio. No. 25, s. 4.
..... During the absence or illness of the Divorce Judge, ... or in any case in which he thinks it inexpedient for him to exercise jurisdiction under the Matrimonial Causes Acts, ... any Judge nominated by him may sit alone and hear and determine all causes and matters under the Matrimonial Causes Act in like manner as the Divorce Judge might have done if not so incapacitated. 	 During the absence or illness of the Chief Judge in Equity, ... any Judge may sit alone and determine all proceedings in Equity, and all motions and matters in relation thereto, in like manner as the Chief Judge in Equity might have done. but subject to the like appeal.	 At the request of the Chief Judge in Equity or the Divorce Judge respectively, or of the Chief Justice, any Judge may sit alone and hear and determine all causes and matters depending in the Equity or Ecclesiastical, or in the Matrimonial Causes jurisdiction, and shall have, while so acting, co-ordinate jurisdiction with and all the powers of, the Chief Judge in Equity or the Divorce Judge. subject to the same right of appeal as now exists from the decision of such Judge.	During vacation, or during the absence or illness of the Judge in Bankruptcy, or for any other reasonable cause, ... any Judge may transact bankruptcy business, and exercise the powers of the Bankruptcy Judge. 	 During the absence or illness of the Probate Judge, ... or at his request, any Judge may exercise the Probate jurisdiction of the Court.

S. 16.

PART III.

JURISDICTION OF THE COURT, AND HOW EXERCISED.

Court authorised to perform certain acts required to be performed by courts in England.

6 Wm. IV, No. 12, s. 1.

16. Where any Imperial Act in force in England on the first day of March, in the year of our Lord one thousand eight hundred and twenty-nine, and applicable to New South Wales, or any Imperial Act adopted and directed to be applied in New South Wales, authorises and directs any proceeding, act, matter, or thing to be had, done, performed or executed by or before Her Majesty's Courts at Westminster or the respective Judges thereof in the administration of justice, every such proceeding, act, matter, and thing shall be, and the same is hereby authorised and directed to be, had, done, executed, and performed by the Court and the respective Judges thereof in like manner as if the same had been in and by such Imperial Act expressly authorised and directed to be had, done, executed, and performed by the Court or the respective Judges thereof.

General jurisdiction was conferred on the Court by the Charter of Justice and the Imperial Act, 9 Geo. IV, c. 83, s. 3 (*post*.)

Two or more Judges may exercise jurisdiction of Court.

4 Vic. No. 22, s. 19.

45 Vic. No. 1, s. 5.

17. Subject to the provisions of this Act, or of any other Act in force for the time being, every power, jurisdiction, or authority conferred on or entrusted to or vested in the Court or the Judges collectively may lawfully be exercised by two or more of the Judges.

This has always been taken to be the meaning of the original sections, and has been acted upon as their meaning.—(*Commissioner's Note*).

Constitution of Court on appeals from Judges.

36 Vic. No. 9, s. 49.

45 Vic. No. 1, s. 5.

48 Vic. No. 13, ss. 1, 2, 3.

51 Vic. No. 19, s. 135.

18. (1) No Judge shall sit on the hearing of an appeal from or on a motion to set aside any judgment, order, decree, rulings or decision made by him in any jurisdiction of the Court.

(2) The Court on the hearing of any such appeal or motion shall consist of not less than three Judges.

(3) This section shall not apply to—

- (a) any judgment, order, decree, ruling, or decision pronounced or made *pro forma* by consent of parties; or
- (b) any motion for a rule nisi only; or
- (c) the hearing of an appeal or motion before two Judges only where the parties consent thereto.

No judge shall sit on the hearing of an appeal from . . . any decision made by him, etc.—This section does not prevent a Judge varying his own order: *Griffiths v. McGrath*, (1888) 5 W.N. 12.

In *Ex parte Johnson*, 14 N.S.W.R. 537, it was held that a Judge, who, on the hearing of an application in Chambers, sits on the bench not to decide the matter, but in order that he may be consulted by, and may give his opinion to, the sitting Judge, may sit on the hearing of an appeal from the order then made.

A Judge who formally refuses to nonsuit (which must be by consent) is at liberty to sit on the hearing of the new trial motion: *Byrnes and another v. Western and another*, 17 N.S.W.R. 80.

Not less than three Judges—The original section says three Judges, but the Court has apparently always interpreted this to mean at least three Judges.—(*Commissioner's Note*).

Subsection (3) (a) The words "or decision," omitted *per incuriam*, are supplied.—(*Commissioner's Note*).

Ruling pro forma.—See *Byrnes and another v. Western and another*, *supra*.

19. The Court may be held by one Judge alone for the disposal of— **S. 19.**

- (a) returns of fines and estreated recognisances ; and
 (b) applications for and returns to writs of *habeas corpus*, notwithstanding that it may be term time, or that the Court held before two or more Judges may be at the same time sitting in banco.

Court held by one Judge in certain cases.

22 Vic. No. 14, s. 7.

20. In order to prevent the delay and consequent mischief which might otherwise ensue :—

- (1) Every Judge shall in vacation have power to make all such orders and grant all such writs as can only under ordinary circumstances be made or granted respectively by the Court :

Powers of single Judge in vacation.

4 Vic. No. 22, s. 27.

Provided that no such order or writ shall continue in force after the first day of the next ensuing term unless the Court shall then otherwise direct.

- (2) The like power may be also exercised by any Judge in cases of urgency in term :

And in certain cases in term.

Provided that no order made or writ granted as last aforesaid shall continue in force after the then next ensuing sitting day in banco of the Court.

In order to prevent the delay and consequent mischief, etc.—"This provision it is conceived, was intended to apply only to cases of urgency,—cases in which mischief would probably ensue (if not irreparable, yet causing serious damage to the party either in person or in property) should the application not be immediately complied with."—*Stephen's Practice*, ed. 1843–5, 55. "In ordinary cases or under ordinary circumstances, the power is plainly not given ; but only where a strong case is made out for immediate interference," *ibid.* 180.

It has been said that a foundation for the interference of a Judge must be shown by clearly setting out in the summons that it is a case of emergency, and the order of the Judge ought to bear on its face sufficient to show that he had jurisdiction: *Reynolds v. Tree*, (1847) 1 Legge 402 ; but see *infra*, **Form of summons and order**.

In vacation.—In practice the expression "in vacation" is treated as equivalent to "out of term," and the powers conferred by this section are accordingly exercised by a single Judge during sittings : see *Coulshaw v. McLeod*, (1898) 14 W.N. 189.

Have power to make all such orders, etc.—It has been held that a single Judge in vacation may :—

Grant leave to appeal to the Privy Council : *Wallack v. Lloyd*, (1861) 2 S.C.R. N.S. 67 (in note to *Barclay v. Bank of New South Wales*) followed with doubt in *Want v. Bennett*, (1879) 2 S.C.R. N.S. 311 ; but the constant practice since, see *Borough of Randwick v. Dangar*, (1898) 15 W.N. 56 ; 19 N.S.W.R. 395 ; 15 W.N. 104.

Hear and determine applications for writs of prohibition, even where the amount in question exceeds £30 : *Ex parte Hayes*, (1869) 8 S.C.R. 79 ; amend a rule of Court so as to be in accordance with the facts of the case : *Currie v. Municipality of Lismore*, (1884) 1 W.N. 6 ; vary his own order : *Griffiths v. McGrath*, (1888) 5 W.N. 12 ; discharge an order for attachment made *ex parte* by the Full Court : *Sachs v. Beaumont*, (1888) 9 N.S.W.R. Eq. 48.

In *In re Phillips*, (1887) 4 W.N. 14, *Stephen*, J., in vacation made an order under s. 4 of the Real Property Act of 1877 (41 Vic. No. 18) directing a caveator to lodge his case. At a later stage in the same proceedings (*ibid.* 70) *Darley*, C.J., holding that a single Judge, even in a case of urgency, had no jurisdiction under the section, dismissed an application for an order directing issues to be tried. The question was again raised in *In re Mackenzie*, (1890) 11 N.S.W.R. 277, (a case of an order under s. 23 of the Real Property Act), and it would seem from the judgment of *Stephen*, J., in that case, that a single Judge may make such an order subject to confirmation by the Full Court. The latest case on the subject is that of *In re Morrice*, (1894). 10 W.N. 156 ; 15 N.S.W.R. 107, where the Full Court consisting of *Darley*, C.J., *Innes* and *Foster*, J.J., held that an order restraining the Registrar-General from

S. 20. proceeding with an application to bring lands under the Real Property Act might be made by a single Judge in vacation under the section. But these cases turned on the construction of the Statutes in question.

A rule *nisi* for a prohibition granted under 1900 No. 35, s. 20, was made returnable before a Judge in Chambers; *held* that the order absolute required confirmation: *Ex parte Piley*, (1903) 3 S.R. 8.

Form of summons and order.—In *Reynolds v. Tree*, *supra*, Stephen, C.J., in delivering the judgment of the Court said, that in all cases it had been so decided, that before this particular interference of a Judge could be exercised, a foundation for that interference must be laid; and that foundation consisted in having it clearly set out in the summons that it was a case of emergency, and without that fact, a Judge had no jurisdiction; and that he was inclined to think that the order itself, made upon the hearing of that summons, ought to bear upon its face sufficient to show that the Judge who made it had jurisdiction. But in *Re Stephen*: *Ex parte Chambers*, (1886) 7 N.S.W.R. 187; 2 W.N. 87; Mr. Justice Windeyer, in his judgment, draws the distinction between the powers of a Judge acting in term time. He says—"By the first part of the section general power is given to the Judge, in order to prevent the mischief which would arise through the delay, to exercise the powers of the Full Court in vacation. It is unnecessary that the summons or order made in such cases should call attention to the fact that the Judge is exercising the power conferred by that section." But, he points out, this must be done where the application is made in a case of exigency, in term, under the subsequent part of the section. See also *Ex parte Brennan*, (1898) 14 W.N. 31. So also in vacation where the case is one in which a single Judge would have jurisdiction independently of the section, and it is sought to obtain not merely a Judge's order, but a rule of Court, upon which execution may issue: See judgment of Martin, C.J., in *Re Stephen*, *supra*.

Proceedings under this section should not be entitled "In Chambers": *Ex parte Dent*, (1901) 18 W.N. 270.

The order must be signed by the Judge and not by the Prothonotary: *Ex parte John Campbell*, (1893) 10 W.N. 88.

Provided that no such order, etc.—Application must be made to the Court on the first day of term that the order obtained, and all proceedings thereon, may be confirmed. If not then confirmed the order lapses, and the Court has no jurisdiction to confirm it subsequently: *Ex parte Carter*, (1885) 1 W.N. 155. But an independent application may be made (in a proper case) to the Court for a new order: *ibid.*; *O'Sullivan v. Aarons*, (1866) 5 S.C.R. 336. See also *Ex parte Royle*, (1884) 5 N.S.W.R. 468, where the Court granted and made absolute a rule, notwithstanding the fact that on a previous application to a Judge under the section the rule had been refused. For further cases on the question of confirmation see *Ex parte McShane*, (1879) 1 S.C.R. N.S. 10; *Ex parte Irwin*, (1871) 10 S.C.R. 49; *Ex parte Gale*, (1891) 7 W.N. 93; *Ex parte Medlyn*, (1893) 9 W.N. 184; *Ex parte Dempsey*, (1896) 13 W.N. 43; *Ex parte Workman*, (1895) 12 W.N. 23.

Appeal.—The proper way of appealing against the Judge's order is to oppose the motion for its confirmation: *Ex parte Ferguson*, (1889) 6 W.N. 1; and see *Want v. Bennett*, (1879) 2 S.C.R. N.S. 311, where the Full Court varied an order; but whether there cannot also be an appeal by way of notice of motion, see *Ex parte Lucas*, (1902) 19 W.N. 39, 98.

As to the procedure, see *Bernstein v. Lynch*, (1898) 15 W.N. 129, where it was held that on a motion to confirm an order the party opposing being the appellant has the right to begin.

The practice is for the party opposing the confirmation to appear on the 1st day of term and so state; on that, the matter is adjourned, and takes its place in the list.

If the Judge has made an order granting an application, the refusal of the Court to confirm it operates as a dismissal of the application: *Ex parte Godfrey*, (1899) 16 W.N. 33. But if the Judge had dismissed an application (or discharged a rule nisi) the Court in refusing to confirm that order makes a substantive order granting the application, or making a rule absolute, as the case may be: *Denham v. Foley*, 15 W.N. 232.

An applicant for a prohibition whose application had been refused by a Judge filed a notice of motion by way of appeal, so as to preserve his right of appeal in case the successful party did not move to confirm the order. The successful party moved to confirm the order, and the unsuccessful party opposed the confirmation and the matter then stood in the list as opposed. The Court directed both motions to be heard together: *Ex parte Lucas*, (1902) 19 W.N. 39, 98.

Judge's order should be served.—The Judge's order, if final, should be served on the other side before the first day of term, so that they may have an opportunity of opposing the confirmation, but this is not necessary (for this purpose) where it is an order *nisi* only: *Thompson v. Hood*, (1884) 5 N.S.W.R. 202; and the other party will not be heard to oppose the confirmation of an order *nisi*: *Jones v. Jones*, (1898) 19 N.S.W.R. 43; 14 W.N. 207.

Service of confirming order.—The rule confirming the order must be taken out and served within a reasonable time: *Thompson v. Hood*, *supra*; *Ex parte Murray*, (1902) 19 W.N. 192; but the other side may waive the omission by taking a subsequent step in the cause: *Thompson v. Hood*, *supra*.

First day of . . . Term.—If the Court does not sit on the first day of term, the day of the first sitting is the first day of term for the purposes of this section. It was so held on the 25th of October, 1892, when several Judge's orders were confirmed though by the Rules for the year the term was fixed to begin on the 24th.

Proviso to subsec. (2).—The expression "unless the Court shall then otherwise direct" is not repeated; but the practice as to confirmation has hitherto been the same as in cases where the order is made in vacation.

The power of the Court to confirm an order made in term does not seem to have ever been questioned. See *Ex parte Pitt and another*, (1893) 9 W.N. 160.

Jurisdiction of Judge in Chambers.—As questions frequently arise respecting the power of a Judge in Chambers to deal with a given matter, and the right of appeal against his decisions, it has been considered advisable to insert here references to decided cases on these points.

At Common Law.—Apart from statutory authority it seems difficult to give any general definition of the power of a Judge at Chambers. In England it has been said that "the common law appears to vest in a single Judge the same equitable jurisdiction over the proceedings in a cause which it vests in the Court of which he is a constituent member. His act therein is potentially the act of the Court; for though he cannot directly enforce the orders he makes, nor exercise any of what may be termed the prerogative powers of the Court, yet the Court will adopt his orders, and for disobedience thereto, when so adopted, will issue process of attachment as if the matter had been originally ordered by the Court itself." Lush, Practice, 668. And the same remarks as far as they go ("equitable" being apparently used not in a technical sense) apply here. It is to be observed that the position of a Judge at *nisi prius* and on Circuit here is different from what his position was in England. "The position of a Judge in this Court trying issues is altogether different from that of a Judge in the Court at *nisi prius* in England. There he is a mere commissioner and need not be a Judge of the Court in which the action is brought," *per Martin, C.J.*, *Rawnsley v. Municipality of Hay*, (1880) 1 N.S.W.R. 346. And it appears that a Judge in that position here represents and is the Court and his order is a rule of Court: *semble, ibid.*; and see *Currie v. Municipality of Lismore*, (1884) 1 W.N. 6.

Under Statute.—But where the question arises on the interpretation of a Statute the general rule as to the relative powers of the Court and a Judge is thus stated in Chitty's Archbold's Practice, at p. 1598:—"Where a statute expressly or impliedly directs that the application shall be made only to the Court, a Judge has no power to interfere: *Morgan v. Lute*, 1 Chit. Rep. 381; *Shaw v. Roberts*, 2 Dowl. 25; *Jones v. Fitzaddams*, 2 Dowl. 111; 3 Tyr. 904; 1 C. & M. 855; *Ex parte Owen*, 1 Dowl. 511; *Lander v. Gordon*, 7 M. & W. 218; *Ross v. Gandell*, 18 L.J.C.P. 224; 7 C.B. 766.

"And *vice versa*: See *per Coleridge, J.*, 7 Dowl. 735; *Morse v. Appleby or Appleperley*, 8 Dowl. 203; 6 M. & W. 145; *Barnett v. Craw*, 1 Dowl. N.S. 774; *Wearing v. Smith*, 16 L.J.Q.B. 1; 9 Q.B. 1024. [See also *Clark v. Smith*, 3 C.B. 982.]

"But when a statute, in general terms, and without any special limitations, either expressed or to be inferred from its terms, gives any power to one of the Superior Courts, that power may be exercised by a Judge at Chambers: *Smeeton v. Collier*, 1 Ex. 457; 17 L.J. Ex. 57."

So also in Lush's Practice, p. 948:—"Where a statute gives new powers to the Court in general terms, without any express limitation, those powers may be exercised by a Judge at Chambers. Thus where the enactment (7 Geo. 2, c. 20, s. 1) was that 'the Court shall and may by rule or rules of the same Court compel such mortgagee to deliver up all deeds,' &c., it was held that this power might be exercised by a Judge: *Smeeton v. Collier*, *supra*. But under the words of the 43 Geo. 3, c. 46, s. 2, 'the sum of money so deposited, &c., shall by order of the Court, upon motion to be made for that purpose,' and of sec. 3 of the same statute, 'upon motion to be made in Court for that purpose,' and of the 48 Geo. 3, c. 123, s. 1, 'upon his application for that purpose in term time made to one of the Superior Courts,' it has been held

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that the Court only has jurisdiction, on the ground, as it would seem, that the words in italics showed the intention of the legislature to confirm the power to the Court alone." (See cases cited above.)

As to the jurisdiction of a Judge where powers are given to the Court by statute without restraining words, see remarks of *Windeyer, J.*, in *In re Mackenzie*, (1890) 11 N.S.W.R. at p. 280.

"The general principle, no doubt, is that where powers are given to the Court by statute, unless there are restraining words showing that the Legislature did not intend the Court to act through a Judge (as it very often does in the administration of its powers) a single Judge must be taken to have jurisdiction given to him which was given generally to the Court," though in this case the Court came to the conclusion that under the statutes in question (the Real Property Act and its amending Acts) a certain order could only be made by the Court; finding the powers of "the Court" frequently distinguished from those conferred on a "Judge" in these statutes.

Fresh application to Court.—The refusal of a Judge to grant an application (for change of venue) is not of itself a bar to the granting of a similar application by the Court, new facts may be adduced on the latter application; but the fact of the previous application and its result should be brought before the Court, and all materials that were before the Judge may be used again by either party; but the Judge's order may or may not be discharged or varied as incidental to the order of the Court: *O'Sullivan v. Aarons*, (1866) 5 S.C.R. 336.

Appeal from the order of a Judge in Chambers.—The cases decided upon the right to appeal to the Court against a Judge's order are somewhat conflicting. The rule generally followed in England appears to have been that a party dissatisfied with a Judge's order may in general apply to the Court to have it set aside and this, although the decision of the Judge in the case was on the merits. And even where, by Act of Parliament, power was given to a single Judge to decide a matter, an appeal lay to the Court unless it was expressly or impliedly excluded; though the Court would not in general review a Judge's order in cases where the subject matter was left exclusively to his discretion. *Chit. Arch.* 1609; *Lush.* 948; and the following cases there cited:—*Pike v. Davis*, 8 Dowl. 387; *Re Stretton*, 14 M. & W. 806; *Shortridge v. Young*, 12 M. & W. 5; *Teggin v. Langford*, 2 Dowl. N.S. 467; 10 M. & W. 556; *Fowler v. Churchill*, 2 Dowl. N. S. 562; *Brown v. Bamford*, 9 M. & W. 42; *Wearing v. Smith*, 10 Jur. Q.B. 924; *Kilkenny Railway Co. v. Fielden*, 20 L.J. Ex. 141; *Johnston v. Knowles*, 1 Dowl. N.S. 30; *Robinson v. Burbidge*, 9 C.B. 289; *Stokes v. Grissell*, 14 C.B. 678; *Jenkins v. Treloar*, 1 M. & W. 16; *Cholmondeley v. Payne*, 3 Bing. N.C. 708; *Tadman v. Wood*, 4 A. & E. 1011; *Lane v. Newman*, 1 B.C. Rep. 93.

But in this colony it has been held that where a statute gives a power to be exercised by a Judge, and not by a Judge or the Court, the power so given must be exercised by the Judge only, and the Court has no jurisdiction either to exercise the power in the first instance, or to interfere on appeal with the order made by the Judge, unless such appeal is expressly given: *Ex parte Jones*, (1874) 12 S.C.R. 284. It was accordingly held in that case that no appeal lay against an order of a Judge under the 98th section of the District Courts Act, 22 Vic. No. 18, (C.L.P. Act, s. 117 (ante)) ordering issues to be tried in a District Court, but it is to be observed that this was a matter for the Judge's discretion, and where a judge in such case makes an order exceeding his jurisdiction an appeal lies: *Norton v. Ricketson*, (1893) 14 N.S.W.R. 343; 9 W.N. 183; 10 W.N. 43; and *Thompson v. Southern Coal Co.*, (1894) 15 N.S.W.R. 162; 10 W.N. 181, seems to come under this head.

Nor does an appeal lie against the refusal of a Judge to certify for costs under the 101st section of the same Act (C.L.P. Act, s. 267, ante): *Siddons v. N.S.W. Shale & Oil Co.*, (1874) 12 S.C.R. 364; again a matter in the Judge's discretion.

An appeal lies against the order of a Judge granting or refusing a prohibition under the Justices Act, 17 Vic. No. 39, s. 5: *Ex parte Marx*, (1868) 7 S.C.R. 344; but the section of the statute expressly provides for it.

In cases where a statute gives a power to "the Court or a Judge" the right to appeal depends upon whether the power is discretionary or not. Where it is discretionary, the decision of the Judge is binding, and will not be reviewed by the Court. But where the order applied for is imperative on the tribunal, if certain facts are made out, and the Judge mistakenly decides those facts, or erroneously holds that he is not bound to do the thing required, then the Court may be applied to; for it is still the superior tribunal to correct errors: *Outrim v. Bowden*, (1847) cited in *Ex parte Baillie*, (1865) 5 S.C.R. at p. 22. An appeal lies from the order of a Judge directing execution to issue, on a memorial of judgment under s. 3 of 19 Vic. No. 12,

(now Inter-State Debts Recovery Act, 1901, ss. 8-11 (*ante*)), where power is given to "a Judge of the Court or the Court": *Warner v. Fischer*, (1875) 13 S.C.R. 346. No appeal lies against the refusal of a judge to grant a writ of *certiorari* under s. 37 of the District Courts Act, 1901, because it is a matter in the discretion of the Judge; but an independent application for the writ may afterwards be made to the Court: *Cross v. Goode*, (1886) 7 N.S.W.R. 72; 2 W.N. 70.

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When the Judge is, by Statute, clothed with the authority of the Full Court, there is no appeal to the Court from his decision; e.g. under the Justices Appeal Act, 45 Vic. No. 4, s. 7, of which provides that "the authority and jurisdiction hereby vested in the Supreme Court shall and may * * * be exercised by a Judge of such Court sitting in Chambers as well in vacation as in term time": *Banks v. Norris*, (1890) 11 N.S.W.R. 77; 6 W.N. 137. See also *Ex parte Stevenson*, (1892) 1 Q.B. 394.

And in *Re Knight*, (1897) 18 N.S.W.R. 315; 14 W.N. 56; it was held that no appeal lay from the order of a Judge made under s. 82 of the Real Property Act (s. 97 of the Act of 1900) where the words are "Supreme Court or a Judge thereof." "The section creates two distinct and independent tribunals;" and in such a case there is no appeal except in questions of procedure; and *Ex parte Jones*, 12 S.C.R. 284, and *Warner v. Fischer*, 13 S.C.R. 352, are said to be cases of procedure; so *Bulter v. Walsh*, (1895) 11 W.N. 117. And see *Ex parte Chales*, (1896) 13 W.N. 107, a case under s. 93 of the District Courts Act (s. 110 of the District Courts Act, 1901) and *Cross v. Goode* (*supra*).

When a rule is granted returnable in Chambers, it has been held in England that the order of the Judge making absolute or discharging such rule cannot be revised by the Court: *Reg. v. Sheriff of Lancaster*, 4 Jur. 538; but our Court has refused to follow this decision, and has held that the Court does not necessarily, by making a rule returnable in Chambers, deprive the parties of their right to appeal: *Ex parte Baillie*, (1865) 5 S.C.R. 17; but see *Ex parte Pilley*, (1903) 3 S.R. 8.

No appeal lies on a question of costs: *Fanning v. Simmons*, (1866) 5 S.C.R. 224, at p. 230; at least where no principle is involved, and the question of costs is in the Judge's discretion: *ibid.* "It is an inflexible rule not to disturb an order on account of a decision as to costs," *per Stephen, C.J.*, *Re Castle*, (1867) 6 S.C.R. 195, 200. But on a matter of principle there may be an appeal: *Ex parte Nelson*, (1871) 10 S.C.R. 182.

Where a rule is made returnable before a Judge sitting as the Court under s. 7 of the Act 22 Vic. No. 14 (now the Justices Act, 1902, s. 112 (5)) it should be so expressed and not made returnable before a Judge in Chambers: *Ex parte Dent*, (1901) 18 W.N. 270; *Ex parte Godfrey*, (1899) 15 W.N. 279.

Procedure on appeal.—The proper way to appeal from the order of a Judge in Chambers is by motion on notice: *In re Commercial Bank of Australia*, (1895) 11 W.N. 124. The order appealed from must be before the Court, annexed to an affidavit: *Zaccour v. Basha*, (1899) 20 N.S.W.R. 431; 16 W.N. 107; *Herbert v. Municipal District of Manly*, (1900) 21 N.S.W.R. 373; 17 W.N. 197. Only the material that was before the Judge can be used on the appeal: *Thompson v. Southern Coal Co.*, (1894) 15 N.S.W.R. 162; 10 W.N. 181.

Taking out and serving on the other side a Judge's order was held no bar to appeal, where the service was accompanied by notice of intention to appeal: *Ex parte Monson*, (1866) 5 S.C.R. 256; though the better course would be to take out the order and give notice to the other side that this has been done for the purpose of appealing: *Ex parte Keogh*, (1863) 3 S.C.R. 210. Taking out and serving the order without notice of intention to appeal, held a bar: *ibid.*

21. (1) Two or more Courts, each consisting of two or more Judges, may during term be held simultaneously in banco.

Court may be held in two or more divisions.

(2) Subject to the provisions of this Act, each such Court shall have power to exercise the full jurisdiction of the Court hitherto possessed while sitting in banco.

55 Vic. No. 3, s. 2.

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PART IV.

CIRCUIT COURTS.

Circuit districts.
5 Vic. No. 4, s. 1

22. The Governor may by proclamation apportion and divide New South Wales into three or more circuit districts, and ascertain and fix the boundaries and limits of every such district, and alter such boundaries and limits from time to time as occasion may require.

Proclamation of
Circuit Courts.
4 Vic. No. 22,
s. 16.

23. The Governor may by proclamation direct Circuit Courts to be holden in or at such towns and places as he thinks fit to appoint, and fix from time to time, and vary or alter, as occasion may require, the times and places for holding the said Courts respectively.

Court to be
holden by a
Judge.

Ibid. s. 17.

24. Every Circuit Court shall be holden by a Judge.

Officers.
Ibid.

25. Every Circuit Court shall have such ministerial officers as may be required.

The Public Service Act now regulates the mode of appointing to the Public service.

Nature of
Courts defined.
Ibid.

5 Vic. No. 4, s. 1.

26. Every Circuit Court shall be—

- (a) a court of record ; and
- (b) a court of oyer and terminer and of assize and nisi prius for New South Wales ; and
- (c) a court of gaol delivery in and for the particular district only within which it is appointed to be holden.

General powers
and jurisdiction.
4 Vic. No. 22,
s. 17.

27. Every Circuit Court shall have the same powers and jurisdiction as courts of oyer and terminer, and gaol delivery, and of nisi prius in England had respectively at the time of the passing of the Act fourth Victoria number twenty-two, and shall stand in the same relation to the Court as such courts respectively stood in with respect to Her Majesty's Superior Courts of Record at Westminster at the time of the passing of the said Act.

Jurisdiction in
civil actions.
Ibid.

5 Vic. No. 4,
s. 2.

28. Every Circuit Court may—

- (a) try and determine all issues of fact joined in any action or other proceeding commenced or pending in the Court ; and
- (b) inquire into and assess damages in any such action.

Criminal
jurisdiction.
4 Vic. No. 22,
s. 17.
5 Vic. No. 4,
s. 10.

29. Every Circuit Court may, upon information exhibited therein—

- (a) by and in the name of Her Majesty's Attorney or Solicitor General ; or
- (b) in case of their absence from such Court, by and in the name of such other person as the Governor appoints in that behalf,

hear and determine all cases of crimes and misdemeanours committed in New South Wales.

30. Every person convicted in any Circuit Court of any crime or offence cognizable therein shall be liable to the same penalties and punishments as by law could be inflicted on such person if convicted in the Court of such crime or offence. **S. 30.**

Jurisdiction as to punishment.
5 Vic. No. 4, s. 2.

31. Every Circuit Court shall proceed in all cases according to the form and manner observed and established by law in the Court in similar cases.

Procedure.
4 Vic. No. 22, s. 17.

32. If in any case the Judge does not arrive at any such circuit town or place in time to open the Circuit Court, or does not actually open such Court on the day for that purpose appointed by any such proclamation as aforesaid, the subsequent holding of such Court shall not for that reason be or be taken to be illegal, but the same may be opened and holden, either by the same Judge or by any other Judge, on any following day :

Delay in opening Circuit Court.
Ibid. s. 18.

Provided that every such Circuit Court shall be actually opened and holden on the day so appointed except in cases of unavoidable accident, and that then such Court shall be opened and holden as soon afterwards as possible.

33 The records of every Circuit Court shall be taken to belong to and shall be kept in the Supreme Court, and the Prothonotary shall have their legal custody :

Custody of records.
46 Vic. No. 17, s. 359.

Provided that during the sitting of any Circuit Court the Judge's Associate, or other officer there acting as clerk of Assize, shall in respect of all proceedings at such sitting have the custody of such records.

PART V.

COURT FEES.

34. (1) The Governor may, by notice in the Gazette, direct that after the day specified in the notice all or any of the fees to be demanded and paid in the Court or in any Circuit Court shall be collected by means of stamps.

Governor may direct fees to be collected by means of stamps.

(2) After the day so specified, the fees mentioned in the notice shall be received by stamps denoting the sums payable, and not in money.

60 Vic. No. 19, s. 3.

(3) All or any of the stamps shall be impressed or adhesive as may be directed in the notice.

35. (1) Where any fee mentioned in such notice is payable in respect of a document, the stamps denoting the fee shall be affixed to or impressed upon the document, or such other document, book, or record as may be prescribed by regulations made under the authority of this Act.

Document, book or record to be stamped.
Ibid. s. 4.

(2) Where any fee mentioned in such notice is payable otherwise than in respect of a document, the stamps denoting the fee shall be affixed to or impressed on such document, book, or record as may be prescribed as aforesaid.

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(3) The Governor may make regulations prescribing the document, book, or record to be stamped as aforesaid.

Document to be stamped before being filed.

60 Vic. No. 19, s. 5.

36. No Judge or officer of any Court shall allow any such document as aforesaid to be filed, received, or used, although no exception be taken thereto, until the document has been first duly stamped. And if the document is through mistake or inadvertence filed, received, or used in any Court without having been first duly stamped, the said Court or a Judge may order that it be duly stamped.

Or a Judge.—These words having been inserted to save reference to the Full Court in a case say at *nisi prius*.—(*Commissioner's Note*.)

Officers to see that stamps are affixed or impressed and duly cancelled.

Ibid. s. 6.

37. Every officer whose duty it is to receive any fees, which under the authority of this Act are required to be collected by means of stamps, shall see that the proper stamps have been affixed to or impressed on the document, book, or record required to be stamped, and that when adhesive stamps are used the same are duly cancelled.

Provisions of Stamp Acts to apply.

Ibid.

38. The provisions of the Stamp Duties Act, 1898, and of any Act amending the same shall, so far as applicable, extend and apply to and in respect of all stamps required under this Act to be used.

PART VI.

RULES.

Power to make rules.

4 Vic. No. 22, s. 23.

15 Vic. No. 17, s. 1.

60 Vic. No. 19, s. 2.

39. The Judges may make all such general rules and orders as to them seem meet—

- (a) for the regulation of practice and pleadings in the Court in all respects in the several branches of its jurisdiction ; and
- (b) for facilitating, or more fully carrying into effect, all or any of the provisions and objects of Part IV of this Act ; and
- (c) for fixing the amount of fees and costs to be allowed in respect of all matters at any time pending in the Court to the practitioners therein ; and
- (d) for fixing the fees to be demanded and paid in the Court and in the Circuit Courts ; and
- (e) for the government and conduct of the officers and ministers of the Court and of the Circuit Courts.

Rules to have force of law.

4 Vic. No. 22, s. 23.

40. Every rule and order so made shall be of the same force and effect as if the same had been inserted in and had formed part of this Act.

This did not originally apply to rules under subsection (c) and (d) of the previous clause, but the omission would seem to have been accidental. The provision for transmitting rules for His Majesty's approval or disallowance has been omitted as obsolete.—(*Commissioner's Note*.)

41. Nothing in this Part of this Act shall affect the provisions of any Act in force for the time being, by which power to makes rules or orders is conferred upon the Court or any Judge.

S. 41.

Power to make rules under other Acts saved.

SCHEDULE.

Reference to Act.	Title or Short Title.	Extent of Repeal.
6 Wm.IV No. 12	An Act to remove doubts respecting the power of the Supreme Court of New South Wales to do and perform certain acts which are required to be done and performed by His Majesty's Courts in England.	The whole.
4 Vic. No. 22.	An Act to provide for the more effectual administration of justice in New South Wales and its dependencies.	Sections 1, 2, 3, 13, 16, 17, 18, 19, 23, 24, 25, and 27.
5 Vic. No. 4.	An Act to make further provision for the trial of cases in the Circuit Courts of New South Wales, and to amend in certain respects the Act providing for trial by jury in such Courts.	Secs. 1, 2, & 10.
5 Vic. No. 9.	An Act for the further amendment of the law and for the better advancement of justice.	Secs. 1 to 11 inclusive.
15 Vic. No. 17	An Act to repeal so much of the Imperial Act ninth George the Fourth, chapter eighty-three, and the Colonial Act fourth Victoria number twenty-two as vests a power of taxation in the Judges of the Supreme Court.	The whole.
17 Vic. No. 12	An Act to amend the law respecting fees taken by officers of the Supreme Court.	The whole.
	The Constitution Act	Secs. 38, 39, 40, and so much of section 51 as relates to Judges.
22 Vic. No. 14	Equity and Banco Business Expediting Act.	Secs. 4, 5, 6, and section 7 except in so far as it relates to cases under the Justices Acts.
25 Vic. No. 9.	An Act to amend the law as to the qualification for certain judicial and other offices.	So much as refers to the offices of Chief Justice and of the Puisne Justices.
28 Vic. No. 7.	An Act to authorise the appointment of an additional Judge of the Supreme Court.	The whole.
36 Vic. No. 9.	Matrimonial Causes Act	Secs. 3 and 4.
44 Vic. No. 18	Equity Act of 1880	So much of section 1 as relates to appointment, and section 2.
45 Vic. No. 1.	An Act to authorise the appointment of an additional Judge of the Supreme Court.	The whole.
46 Vic. No. 15	Judges' Salaries and Pensions Act of 1883 ..	The whole.
46 Vic. No. 17	Criminal Law Amendment Act of 1883 ..	Section 359.
46 Vic. No. 19	Retired Judges' Pensions Act of 1883 ..	The whole.
48 Vic. No. 3	Matrimonial Causes Act Amendment Act of 1884.	The unrepealed portion.
48 Vic. No. 13	An Act to regulate appeals to and the Constitution of the Supreme Court sitting in banco.	The whole.

Supreme Court and Circuit Court Act.

Schd.

Reference to Act.	Title or short title.	Extent of Repeal.
50 Vic. No. 35	Supreme Court (Sixth Judge) Act of 1887..	The whole.
50 Vic. No. 36	An Act to enable any Judge of the Supreme Court to hear and determine matters in the Equity, Ecclesiastical, and Divorce jurisdiction of the Court.	The whole.
51 Vic. No. 19	Bankruptcy Act, 1887	The unrepealed portion.
55 Vic. No. 3	Supreme Court Procedure Act of 1891 ..	The whole.
55 Vic. No. 26	Judicial Offices Act of 1892	Section 3.
60 Vic. No. 19	Supreme Court Fees Act, 1896	The whole.

WITNESSES EXAMINATION ACT 1900.

This Act consolidates parts of the following statutes:—

4 Vic. No. 22 ;
5 Vic. No. 9 ;
18 Vic. No. 13 ;
36 Vic. No. 9 ;
44 Vic. No. 18 ;
54 Vic. No. 25 ;

TABLE

Showing how the sections of Acts consolidated have been dealt with.

Section of Repealed Acts.	Section of Consolidated Act.	Remarks.
1 Will. IV, c. 22. (See note to 5 Vic. No. 9, s. 15, <i>infra</i>) ss. 1-3	.....	Omitted as not being within the scope of 5 Vic. No. 9, s. 15.
4	4	
5	7	
6	8	
7	9	
8	10	
9	12	
10	11	
11	.....	Omitted. See note to ss. 1-3.
4 Vic. No. 22, s. 14	4, 6, 11	
5 Vic. No. 9, s. 15	4	
16	11	This section adopts the procedure under 1 Wm. IV, c. 22, <i>supra</i> .
18 Vic. No. 13, s. 2	4	
3	5	
36 Vic. No. 9, s. 12	4	
44 Vic. No. 18, s. 44	4, 11	
54 Vic. No. 25, s. 98	4	

Witnesses Examination Act.**COMPARATIVE**

Showing how the provisions of the sections consolidated in s. 4 of

Section of Act.	4 Vic. No. 22, s. 14.	1 Wm. IV., c. 22, s. 4, adopted by 5 Vic. No. 9, s. 15.	18 Vic. No. 13, s. 2.
In what proceedings examination of witnesses may be directed.	In all cases whether at law or in equity or in any ecclesiastical proceeding, and in any criminal case.	In every action and suit in the Supreme Court of New South Wales	In all cases in which any person, not being a party to the suit, action or proceeding may be examined as a witness de bene esse or under a commission.
At what stage of the proceedings.	At any stage of the case.		
Upon whose application.	In criminal cases on the application or with the consent of both the crown and the prisoner.	Upon the application of any of the parties.	
In whom the power to make the order is vested.	Each of the Judges of the Supreme Court of New South Wales resident at Sydney.	Each of the Judges of the Supreme Court of New South Wales resident at Sydney.	The Court or a Judge.
Persons who may be ordered to be examined, and circumstances under which persons may be ordered to be examined.	Any witness who is (a) beyond the seas, or (b) at a greater distance than 200 miles from the intended place of trial, or (c) from age or infirmity unable to attend the trial, or where from any of such causes, or from his being about to depart beyond sea or to some place beyond the said distance of 200 miles, the testimony of such witness is in danger of being lost.	Any witness whether within or without the jurisdiction of the Court where the action is depending.	Any party to the suit, action, or proceeding.

TABLE.

the "Witnesses Examination Act, 1899," have been dealt with.

36 Vic. No. 9, s. 12.	44 Vic. No. 18, s. 44.	54 Vic. No. 25, s. 98.	Consolidated Act ss. 4, 9, and 11, (1).
	In every case where the Court (<i>i.e.</i> , the Chief Judge in Equity. See 44 Vic. No. 18, s. 3) shall deem it expedient to do so.		In any action, suit, or proceeding in the Court (<i>i.e.</i> , in the Supreme Court See s. 3 of the Consolidated Act) in any jurisdiction, except a criminal proceeding. (As to criminal proceedings see s. 6 of the Consolidated Act.)
	At any stage of the case.		At any stage thereof.
			Upon the application of any party.
The Court (<i>i.e.</i> , the Chief Justice or the Judge appointed or nominated to sit alone and adjudicate under the Act 36 Vic. No. 9. See s. 49 of that Act).	The Court (<i>i.e.</i> , the Chief Judge in Equity or the Judge acting for him. See ss. 1-3 of 44 Vic. No. 18).	The Court (<i>i.e.</i> , the Probate Judge or any Judge acting for him. See s. 4 of 54 Vic. No. 25).	The Court or a Judge (<i>i.e.</i> , the Supreme Court or a Judge of the Supreme Court. See s. 3 of the Consolidated Act).
Any witness out of the jurisdiction of the Court, or where by reason of his illness or from other circumstances the Court shall not think fit to enforce the attendance of witnesses in open Court.	Any witness.	Any witness in a contested matter who is out of the jurisdiction of the Court, or where by reason of his illness or otherwise the Court shall not think fit to enforce the attendance of the witness in open Court.	Any witness whether within or without the jurisdiction of the Court.

Witnesses Examination Act.**COMPARATIVE**

Showing how the provisions of the sections consolidated in s. 4 of

Section of Act.	4 Vic. No. 22, s. 14.	1 Wm. IV., c. 32, s. 4, adopted by 5 Vic. No. 9, s. 16.	18 Vic. No. 13, s. 2.
How the examination is to be made.	Either viva voce or upon interrogatories as the Judge shall think fit to direct.	On oath upon interrogatories or otherwise.	
Before whom the examination is to be held.	Such person or such commissioner or other officer of the Court as the Judge shall for that purpose appoint.	The master or prothonotary of the Supreme Court or other person or persons to be named in the order (this applies only to the examination of witnesses within the jurisdiction of the Court).	
How the examination is directed or authorised whether by order or commission.	By order or commission.	By order if the witness is within the jurisdiction of the Court, by commission if the witness is out of the jurisdiction of the Court.	
Directions which may be given, and terms which may be imposed.		All such directions touching the time, place, and manner of the examination, whether within the jurisdiction of the Court wherein the action shall be depending or without, and all other matters and circumstances connected with such examination as may appear reasonable and just.	Such terms in all respects as the Court or Judge may think reasonable.
How the results of such examination may be used.	Every such examination being duly taken and returned shall be allowed and read at the trial or hearing accordingly.		Every examination thereupon taken if the same would have been admissible in the case of an ordinary witness, may be read in evidence at the trial or hearing accordingly.

TABLE.

the "Witnesses Examination Act, 1899," have been dealt with.

36 Vic. No. 2, s. 12.	44 Vic. No. 18, s. 44.	54 Vic. No. 25, s. 98.	Consolidated Act, ss. 4, 9, and 11 (1).
Upon interrogatories or otherwise.	Either orally or upon interrogatories as the Court shall think fit.	On oath upon interrogatories or otherwise.	On oath, either viva voce or upon interrogatories or otherwise.
Before any officer of the Court or other person to be named in the order.	Before such person or officer of the Court as it shall for that purpose appoint.	Before any officer of the Court or other person to be named in the order, (this applies only to witnesses within the jurisdiction of the Court).	Before an officer of the Court or other person to be named in the rule or order (this applies only to witnesses within the jurisdiction of the Court).
By commisison.	By commission or order, but a commission need not be sued out for the examination of any witness within the jurisdiction of the Court.	By commission, or if the witness is within the jurisdiction of the Court by order.	By rule or order if the witness is within the jurisdiction of the Court; by commission whether the witness is in or out of the jurisdiction of the Court.
			All such directions touching the time, place, and manner of the examination as well within the jurisdiction as without, and all other matters and circumstances connected with the examination as appear reasonable and just.
	Every such examination being duly taken and returned may be read in evidence at the trial or hearing accordingly.		The examination or deposition of any witness taken under this Act may be read in evidence at the hearing, saving all just exceptions. (See s. 11 (1) of the Consolidated Act.

Witnesses Examination Act.**COMPARATIVE**

Showing how the provisions of the sections consolidated in s. 4 of

Section of Act.	4 Vic. No. 22, s. 14.	1 Wm. IV., c. 22, s. 4, adopted by 6 Vic. No. 9, s. 15.	18 Vic. No. 12, s. 2.
Powers conferred on persons before whom examina- tions are to be held.			
Powers conferred upon Courts in respect of the ex- amination of wit- nesses.			

TABLE.

the "Witnesses Examination Act, 1899," have been dealt with.

36 Vic. No. 9, s. 12.	44 Vic. No. 18, s. 44.	54 Vic. No. 25, s. 98.	Consolidated Act, ss. 4, 9, and 11 (1).
	Every officer or person appointed to examine any witnesses by order of the Court shall have the power of administering oaths and also such other powers as by the order appointing him may be directed.		Any person authorised by any rule, order, or commission under this Act to take the examination of any witness shall take such examination upon the oath of such witness, to be administered by the persons so authorised or by a Judge. (See s. 9 of the Consolidated Act, which consolidates s. 7 of 1 Wm. IV., c. 22.)
All the powers enabling the Court to issue commissions and give orders for the examination of witnesses in actions depending in such Court and to enforce such examination, and all the provisions of any Acts for enforcing or otherwise applicable to such examination, and the witnesses examined shall extend and be applicable to the examination of witnesses under commissions and orders of the Court and to the witnesses examined for all purposes of this Act (<i>i.e.</i> , 36 Vic. No. 9) in like manner as if such Court were trying an action at law pending in such Court.		All the powers now vested in the Supreme Court in its equitable jurisdiction with reference to the issuing of commissions and ordering the examination of witnesses and generally in connection therewith shall extend to and be applicable to the Court in its probate jurisdiction.	NOTE.—The effect of these provisions is preserved by the consolidation in this Act of the sections in which such provisions are contained.

S. 1.

ACT No. XXXIV., 1900.

An Act to consolidate enactments relating to the examination of witnesses and production of documents in certain cases. [Assented to, 19th October, 1900.]

BE it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and Legislative Assembly of New South Wales in Parliament assembled, and by the authority of the same as follows :—

Short title: 1. This Act may be cited as the "Witnesses Examination Act, 1900."

Repeal. Schedule: 2. The Acts mentioned in the Schedule to this Act are, to the extent therein expressed, hereby repealed.

Interpretation. 3. In this Act, unless the context or subject-matter otherwise indicates or requires,—
 "the Court" means the Supreme Court ;
 "Judge" means a Judge of the Court.

A District Court Judge would have no power to order an examination on commission, where issues are remitted to him to be tried under the C.L.P. Act, s. 117 (*ante*) : *Cohen v. Barclay*, (1896) 12 W.N. 136.

Examinations on commission, &c., in civil proceedings. 4. (1) In any action, suit, or other proceeding in the Court in any jurisdiction, except a criminal proceeding, at any stage thereof, and upon the application of any party thereto, the Court or a Judge may by rule or order direct—

1 Wm. IV, c. 22, s. 4.
 4 Vic. No. 22, s. 14.
 5 Vic. No. 9, s. 15.
 18 Vic. No. 13, s. 2.
 30 Vic. No. 9, s. 12.
 44 Vic. No. 18, s. 44.
 54 Vic. No. 25, s. 98.

- (a) that any witness within the jurisdiction of the Court be examined on oath, either *viva voce* or upon interrogatories or otherwise, before an officer of the Court or other person to be named in the rule or order ; or
- (b) that a commission do issue for the examination of witnesses on oath, either *viva voce* or upon interrogatories or otherwise, at any place in or out of the jurisdiction.

(2) The Court or Judge may by the same or any subsequent rule or order give all such directions touching the time, place, and manner of such examination, as well within the jurisdiction as without, and all other matters and circumstances connected with such examination as appear reasonable and just.

The various sections which give powers to the different jurisdictions of the Court to direct evidence to be taken on commission are not all worded alike. Many of the differences are not very material, and it has been necessary to disregard some of them in order to blend the sections and secure uniformity. Thus, this clause combines seven sections, and almost every expression in it represents a compromise. For example, the words "the Court or a Judge" may possibly extend the present powers in the Equity and Divorce jurisdictions ; and the phrase "action, suit, or

other proceeding," is put for a variety of other expressions, some of which may not go so far, as, for example, "in every action," "in all cases at law or in equity and in any ecclesiastical proceeding," "every action and suit," "in every case," "in all cases in which a person not a party to the suit, action, or other proceeding," etc.—(*Commissioner's Note*.)

S. 4.

Upon the application of any party thereto.—On an application to examine a witness *de bene esse* the affidavit in support should state how and in what way the evidence of the witness is material, or facts from which the Court can see that his evidence is material, and that the applicant cannot safely proceed to trial without the evidence: *The Brush Electrical Engineering Co., Ltd. v. Parke and Lacy Co.*, (1891) 8 W.N. 54; *McMahon v. Evans*, (1892) 8 W.N. 94. In *Cox and wife v. Cox*, (1893) 10 W.N. 37, it was held that a cablegram from England saying "Important evidence obtainable," was not sufficient.

Affidavit in support.

At any place in or out of the jurisdiction.—In *Mason v. Delargy*, (1884) 1 W.N. 68, a commission to examine witnesses in England was granted even though the witnesses had been in Sydney and might have been examined *de bene esse* before their departure. And in *The McKay Shoe Machinery Co., Ltd. v. Turner and another*, (1900) 16 W.N. 192, *A. H. Simpson, C.J.* in Eq., quoted with approval *Cock v. Allcock & Co.*, (21 Q.B.D. 178) where the late Master of the Rolls, Lord *Esher*, said, at page 181:—"It is clear that, according to the established practice, it is a matter of judicial discretion, and the commission ought only be granted on reasonable grounds being shown for its issue. The matter being one of discretion, it is impossible to lay down any general rule as to when a commission will be granted. It must depend on the circumstances of the particular case. The Court must take care on the one hand that it is not granted when it would be oppressive, or unfair to the opposite party, and on the other hand that a party has reasonable facilities for making out his case, when from the circumstances there is a difficulty in the way of witnesses attending at the trial. All the circumstances of each particular case must be taken into consideration."

Examination of witnesses abroad.

Judicial discretion.

Mr. Justice *Simpson* then went on to deal with the question of expense and later on in his judgment said: "Now, in the present case, there is nothing to show that it is essential that the examination of these witnesses or any of them should take place here, and I may surely assume for myself that it will be less expensive to examine three witnesses in America than here." He then made the order asked, but ordered that the commission should lie in the office until the plaintiffs filed a proper affidavit of discovery (they being in default as to this), and until the defendant had had an opportunity of making such application to the Court as he thought fit.

Question of expense.

As to a party to the action, see s. 5 (*post*).

Party.

The Court or Judge may by the same or any subsequent rule or order give all such directions, etc.—In *McQuade v. Herman*, (1887) 3 W.N. 102, the commission was granted subject to conditions; and in *Berndt v. Berndt*, (1887) 3 W.N. 58, on an application for a commission and on plaintiff's counsel consenting to an order being made for an examination upon written interrogatories, *Windeyer, J.*, granted the application but would not order interrogatories saying that they would only hamper the case.

A Judge may extend the time granted to a party by the original order for nominating an agent abroad: *Elkan v. Fels*, (1898) 14 W.N. 124.

The application will usually be on summons; no ground need be stated except by reference to the affidavits, which need not be served: R. 311 (*post*).

Costs of the application and of the commission are costs in the cause unless otherwise ordered: s. 12 (*post*).

8. No such rule or order shall be made with respect to a witness who is a party to the suit, action, or proceeding, on the ground of his intended departure from New South Wales or to remote parts within the same, unless it be shown to the satisfaction of the Court or Judge that such departure is in fact urgently required by unavoidable circumstances or some unex-

Parties.

18 Vic. No. 13 s. 2.

- 3. 5.** pected emergency, and that the examination is not sought in order to avoid cross-examination before the Court or a jury.

As the Court can always make the granting of an order of this kind conditional, when the witness to be examined is a party to the suit, some unnecessary words in the original section have been omitted.—(*Commissioner's Note.*)

The like in
criminal
proceedings.
4 Vic. No. 22,
s. 14.

6. In any criminal proceeding, if—

- (a) any witness is out of the jurisdiction of the Court or above two hundred miles from the intended place of trial ; or
- (b) any witness is from age or infirmity unable to attend the trial ; or
- (c) the testimony of any witness is in danger of being lost, by reason of his age or infirmity, or of his being about to depart out of the jurisdiction or to some place beyond the said distance of two hundred miles,

the Court or a Judge may, on the application or with the consent of the Attorney-General or the Crown prosecutor as well as the prisoner, but not otherwise, make a like rule or order in respect of such witness.

The powers given in 4 Vic. No. 22, s. 14, do not seem to have been extended as to criminal cases by the other Acts, and are here, therefore, reproduced. It would seem that the original Act referred only to the Supreme Court, and not to Courts of Quarter Sessions.—(*Commissioner's Note.*)

Commanding
attendance of
witnesses or
production of
documents.
1 Wm. IV, c. 22,
s. 5.

7. (1) When any rule or order is made under the fourth section of this Act—

- (a) for the examination of any witness ; or
- (b) for the issue of a commission for an examination of witnesses within the jurisdiction of the Court,

the Court or Judge may by such rule or order, or by any subsequent rule or order, command the attendance of any person named therein for the purpose of being examined, or the production of any writing or other document mentioned therein, and may thereby direct the attendance of such person to be at his own place of abode, or elsewhere, if necessary or convenient so to do.

Penalty for
disobedience.

(2) The wilful disobedience of any such rule or order shall be deemed a contempt of Court, and proceedings may be thereupon had by attachment, if—

- (a) together with or after the service of the rule or order there has been served an appointment of the time and place of attendance in obedience thereto, signed by the person or one or more of the persons appointed to take the examination, and if—
- (b) in the case of a Judge's order the same is made a rule of Court before or at the time of the application for attachment.

(3) Every person whose attendance is so commanded shall be entitled to the like conduct money and payment for expenses and loss of time as upon attendance at a trial. **8. 7.**
Payment of expenses, &c.,

(4) No person shall be compelled to produce under any such rule or order any writing or document that he would not be compellable to produce at the hearing. Proviso as to documents:

8. (1) Any sheriff, gaoler, or other officer having the custody of any prisoner may take such prisoner for examination under this Act by virtue of a writ of *habeas corpus* to be issued for that purpose. Examination of prisoners.
1 Wm. IV, c. 22, s. 6.

(2) Such writ shall be issued by the Court or a Judge in such circumstances and in such manner as the Court or a Judge may now by law issue the writ commonly called a writ of *habeas corpus ad testificandum*.

9. (1) Any person authorised by any rule, order, or commission under this Act to take the examination of any witness, shall take such examination upon the oath of such witness, to be administered by the person so authorised or by a Judge. Examinations to be on oath.
Ibid. s. 7.

(2) Any witness who upon such oath wilfully and corruptly gives any false evidence shall be deemed to be guilty of perjury.

The reference to affirmation has been omitted as no longer necessary. See Interpretation Act, s. 21, and Hume-Williams on Evidence on Commission, p. 121. —(Commissioner's Note.)

10. (1) Any person authorised by any rule, order, or commission under the fourth section of this Act to take an examination within the jurisdiction may, and if need be shall, make a special report to the Court touching such examination and the conduct or absence of any witness or other person thereon or relating thereto. Report of examiner as to conduct of witnesses, &c.
Ibid. s. 8.

(2) The Court may institute such proceedings and make such order upon such report as justice requires, and as may be instituted and made in any case of contempt of Court.

11. (1) The examination or deposition of any witness taken under this Act may be read in evidence at the hearing, saving all just exceptions. Reading examinations and depositions in evidence.
1 Wm. IV, c. 22, s. 10.

(2) Provided that if it appears to the satisfaction of the Court or Judge at the hearing that such witness is within the jurisdiction and able to attend the hearing, such examination or deposition shall be rejected. 4 Vic. No. 22, s. 14.
5 Vic. No. 9, s. 16.
44 Vic. No. 18, s. 44.

(3) Where such examination or deposition appears to be certified under the hand of the person authorised to take the same, no proof shall be necessary of the signature of such person.

Objection to evidence should be taken before the Commissioner; otherwise the evidence will be admitted at the trial: *Robinson v. Davies*, 5 Q.B.D. 26. In *Stewart v. Byrnes*, (1858) 2 Legge 1091, it was held that on an examination before a commissioner, when a question is objected to, it is the duty of the Commissioner to note such objection for the subsequent decision of the Court, but to allow the questions to be put and to record the answers. And in *Thorold v. Miller*, (1864) 3 S.C.R. 223. *Stephen*, C.J., in his judgment says "As to the excision or omission of some

- S. 11.** of the evidence of the witnesses examined *de bene esse*, I am of opinion that a Judge at *nisi prius* may, in his discretion, if the circumstances in his opinion so require, allow portion only of the evidence so taken to be read in the first instance—the entire of the evidence being open to the adverse party to be advanced eventually by him, if he shall think fit, as part of his case.”

Where an exhibit is appended to evidence taken on commission the evidence may be put in without the exhibit : *In re Wilson*, (1891) 7 W.N. 116.

If a plaintiff's witness, when being examined upon commission refuses to answer a lawful question on cross-examination by the defendant, the defendant may object to the plaintiff using at the hearing any portion of that witness's evidence. But if the defendant wishes to make use of the answer of the witness he must adjourn the matter direct to the Court to compel the witness to answer : *Montgomery v. Macpherson and others*, (1895) 16 N.S.W.R. Eq. 81 ; 11 W.N. 181.

(2) **Provided that, etc.**—In *Hubert v. Brown and others*, (1893) 9 W.N. 157, it was held that a deposition taken *de bene esse* cannot be read at the hearing of a suit if the deponent is in a fit condition to be examined orally. Where one party objected at the hearing to the reading of a deposition on the ground that the deponent was in a fit condition to be examined and tendered evidence to that effect, time was allowed the other side to rebut that evidence.

(3) **Where such examination, etc.**—A Judge's order under 4 Vic. No. 22, s. 14, ordering a commission to issue for the examination of witnesses abroad, contained the following clause “the deposition of every witness shall be signed by him and the Commissioners;” the writ of commission contained no such clause. The commission was duly executed, and the depositions returned without the signature of the witnesses. *Held*, that the clause in the order was merely directory, and that a non-compliance with it did not render the depositions inadmissible in evidence. The writ of commission also directed that the return was to be closed up under the seals of the Commissioners who acted. *Held*, that that applied to the external sealing of the package and that the evidence was not inadmissible, because the Commissioners had not sealed the return to the writ. Certain deeds which were produced to, and proved before, the Commissioners were not attached to the return (the plaintiffs' counsel being unwilling to part with them) but what purported to be copies of them were so annexed—the originals being numbered and marked with the initial letters of the names of the Commissioners. At the trial of the cause deeds so numbered and marked were produced and admitted in evidence, though there was no direct evidence that the deeds were those produced to the witnesses in England, or that the initials were those of the Commissioners. *Held*, that they were rightly admitted ; though the correct course would have been for the Commissioners to have annexed the originals to the return of the writ : *White v. McDonald, Gardner, Hopkins and Cundy*, (1872) 11 S.C.R. 332.

Costs:

1 Wm. IV, c. 22,
s. 9.

12. The costs of every rule, order, or commission under this Act and of the proceedings thereupon shall, except in a criminal proceeding, be costs in the cause unless otherwise directed by the Court, or by the Judge making such order, or by the Judge before whom the cause is tried.

As to the costs of the application see *Vale of Clwydd Coal Mining Co. v. Christie*, (1887) 4 W.N. 56 ; *McCulloch v. Browne*, *ibid.*, p. 70 ; *Mitchell v. Nelson*, (1900) 17 W.N. 16 ; but note that the old Rule as to costs has been altered, see now R. 137 (*post*).

The successful party does not necessarily get the costs of witnesses examined on commission ; their evidence is within the same category as that of the witnesses examined at the trial, and it is a question for the Prothonotary whether their costs should be allowed : *Dubbo Refrigerating Co. v. Rutherford*, (1898) 14 W.N. 181.

See also *Brace & Co. v. Kempson*, (1895) 11 W.N. 147.

The costs of the commission may be allowed although the witness examined was in attendance at the trial : *Zeplin v. North German Insurance Co.*, (1880) 1 N.S.W.R. 204.

SCHEDULE.**Sch. 1.**

Reference to Act.	Title or short title.	Extent of repeal.
4 Vic. No. 22	An Act to provide for the more effectual administration of justice in New South Wales and its dependencies.	Section 14.
5 Vic. No. 9	An Act for the further amendment of the law and for the better advancement of justice.	Sections 15, 16.
18 Vic. No. 13	An Act further to amend the law of evidence..	The unrepealed sections.
36 Vic. No. 9	Matrimonial Causes Act	Section 12.
44 Vic. No. 18	Equity Act of 1880	Section 44.
54 Vic. No. 25	Probate Act of 1890	Section 98.

REGULÆ GENERALES.

THE 22ND DAY OF DECEMBER, A.D., 1902.

Gazette, 19th January, 1903, No. 33.

IN pursuance of the powers vested in us, we do order and direct as follows:—

Commencement.

1. These Rules shall come into force on the sixteenth day of February, 1903.

Rescission of existing Rules.

2. All the General Rules of the Court heretofore made, are hereby rescinded :

Provided that nothing herein shall affect any Rules applicable only to the Equity, Bankruptcy, Matrimonial Causes, or Probate jurisdictions of the Court, or any Rules made under the authority of the Conveyancing and Law of Property Act, 1898, or the Companies Act, 1899, or the Inebriates Act, 1900, or the Darling Harbour Wharves Resumption Act, 1900, or the Rules of the 11th day of December, 1902, for the despatch of business during the year 1903.

Citation of Rules.
1 March, 1886.
R. 32.

3. In all cases where it is necessary to cite or refer to any Rule of the Court, it shall be sufficient to do so by its date and number merely.

Interpretation.

4. In every Rule of the Court, unless there is anything in the subject or context repugnant thereto,—

- (a) The singular number includes the plural, and the plural number includes the singular.
- (b) "Months" means calendar months.
- (c) "Attorney" or "Solicitor" or "Proctor" means an attorney, solicitor, and proctor of the Court.
- (d) "Trial" includes assessment.
- (e) "Memorandum for a New Trial" includes any memorandum filed under Rule 150.
- (f) "Motion for a New Trial" and "Rule nisi for a New Trial" respectively, include any motion or rule nisi made or granted in pursuance of any such memorandum.

5. All distances mentioned or indicated in any Rule of the Court shall be computed according to the nearest route ordinarily used in travelling, unless there is anything in the subject or context repugnant thereto.

RULES
5-10.

Computation of distance.

6. No Rule which has been rescinded by a later Rule, shall be revived by the rescission of such later Rule.

Rescinded Rules not revived by implication.

7. In every Rule applying to any jurisdiction of the Court other than its common law jurisdiction, the term "Prothonotary" shall be deemed to include the Master or Registrar, as the case may be.

Rules applying to all jurisdictions.

8. In all proceedings at law, where no other course of practice is prescribed by these Rules, the practice and forms of the Queen's Bench, which were in force before the 1st day of Hilary Term, 1853, shall be followed so far as the circumstances require and admit, and so far as the same are not repugnant to any Rule of the Court :

Practice where Rules not applicable.
1 March, 1856,
R. 19.
12 April, 1856,
RR. 1, 44.

Provided that this Rule shall not apply to any rules, orders, or regulations which were repealed in England by the Rules of Hilary or Trinity Term, 1853.

Vacations.

9. During the Long Vacation, from the commencement thereof to the 31st January following, both days inclusive, except as in the next Rule provided, time shall not run in any jurisdiction of the Court, nor shall any business other than that specified in such Rule be taken without the leave of a Judge ; but time shall run after the said 31st January, and throughout the Short Vacation.

Vacations.
11 Dec., 1901
R. 25.

10. During the Long Vacation, from the commencement thereof to the 31st January following, both days inclusive—

Vacation business.
10 May, 1856,
R. 15.
11 Dec., 1901,
RR. 26, 27.

- (a) in any action in which the writ has been specially indorsed under the 24th section of the Common Law Procedure Act, 1899, unless the declaration includes counts in respect of causes of action not so indorsed, all steps and proceedings may be taken and time shall run at Law ;
- (b) causes may be set down, and notices of trial, and to admit or produce documents, may be given ;
- (c) all writs may be issued, executed, and returned ;
- (d) judgment may be signed in all cases in which the time which must expire before the same can be signed has expired before Vacation begins ;
- (e) time shall run for putting in, excepting to, and justifying bail ;
- (f) costs may be taxed in any case if the Taxing Officers deem it necessary ;
- (g) all necessary proceedings may be taken for the purposes of an appeal, or for obtaining or dissolving any injunction ;
- (h) summonses in cases of emergency may be returnable in Chambers on any Wednesday, or such other day as a Judge may appoint.

Every memorandum for a new trial must be filed within the time limited by these Rules, notwithstanding Vacation.

RULES
10-17.

Where a specially indorsed writ was issued in vacation and judgment in default of appearance signed in vacation, *held* (under the Rules then in force) that signing judgment was an irregularity and not a nullity, and waived by delay: *Mercantile Bank v. Brodie*, (1887) 8 N.S.W.R. 443; 4 W.N. 117. But the Rules were then different from the present Rules. See *Federal Bank v. Davies*, (1887) 3 W.N. 79, where it was held that it was necessary to have the leave of a Judge to file pleadings in vacation, even in actions on promissory notes. Entering an appearance was not "business" prohibited in vacation under Rules of 1883: *Ruddell v. McCulloch*, (1884) 5 N.S.W.R. 355; 1 W.N. 11.

Vacation ending on a Saturday and term beginning on Monday, the Sunday intervening is to be reckoned in computing time for pleading: *Stitt v. Neill*, (1887) 4 W.N. 57; see *Chalmers v. Atkinson*, (1885) 2 W.N. 9.

Officers of Court.

Hours of
attendance.
20 Dec., 1893.

11. The hours of attendance in the several Offices of the Court on every day, not being Sunday or a holiday, shall be from 9 o'clock in the morning until half-past 4 o'clock in the afternoon: Provided that the Offices shall only be open to the public from 10 o'clock until half-past 3 o'clock, and that on all Saturdays they shall close at 12 o'clock noon: Provided further that on every day on which the Court sits in any jurisdiction, the offices in such jurisdiction shall be opened not later than a quarter past 9 o'clock.

Prothonotary.
1 Mar., 1886,
R. 3.
29 April, 1886,
R. 31.

12. The Prothonotary shall have charge of the Records in the Common Law and Criminal Jurisdictions of the Court, and he shall, by himself or his clerks, discharge all other duties formerly incident to the Offices of Master, Taxing Officer, and Sealer of Writs in the Queen's Bench.

The Chief Clerk may act for the Prothonotary: R.G. of 25th March, 1903 (*post*).

Associates.
1 Mar., 1886
R. 4.

13. The Associates, in addition to their ordinary duties as such, shall sit severally as Clerks of Arraignment and of Assize and Nisi Prius in Sydney as well as on Circuit.

Solicitors.

Register.
Ibid., R.R. 33-4.

14. There shall be kept in the office of the Prothonotary a book, to be called the Register of Solicitors, which shall be open for inspection by any person during office-hours.

Addressee to be
registered.
Ibid. R. 23.

15. Every Solicitor, within one month after his admission, and thereafter in the month of October in every year, or at such other time as a Judge may in any case order, shall cause to be entered in the said Register (or to be filed with the Prothonotary, who shall cause it to be so entered forthwith) a memorandum, under his hand, of the address of his office, and if he does not practise in Sydney, or within one mile thereof, he shall add the name of his Sydney agent, who shall be a Solicitor practising in Sydney.

No process to be
issued by
Solicitor in
default.
Ibid. R. 24.

16. No process shall be issued by or in the name of any Solicitor whose office has not been so registered.

See *Black v. Chinnery*, (1894) 11 W.N. 54; and R. 396 (*post*).

Change of agent
or address to be
registered.
Ibid. R. 23.

17. In like manner, whenever the Sydney agent of any Solicitor, or the office of any Solicitor, is changed, such solicitor shall cause a memorandum of the name of his new agent, or of his new office to be entered in the said Register, or to be filed with the Prothonotary, who shall cause it to be so entered forthwith.

18. Where either party is represented by a Solicitor, all process, pleadings, notices, summonses, orders, rules, and other proceedings which by any Rule or practice of the Court are required or allowed to be delivered to or served upon such party shall be delivered to or served upon his Solicitor; and every matter or thing which by any such Rule or practice is required or allowed to be done by such party may be done by his Solicitor: Provided that this Rule shall not apply in any case where there is anything in the context or the nature of the case to show that the party himself was intended.

**RULES
18-26.**

Service, &c., where party represented by Solicitor.
H.T. 1853.
R.R. 185, 167,
1 Mar., 1856,
R. 8.

See as to service on attorney, Chitty's Archbold 166.

19. Where either party has sued or appeared in person, he shall not afterwards be deemed to be represented by a Solicitor for the purpose of delivery or service within the last-preceding Rule, unless and until he has given to the opposite party notice by a Solicitor that such Solicitor is authorised to act as his Solicitor.

Notice of retainer of Solicitor after suit or appearance in person.
H.T., 1853,
R. 167.

20. No Solicitor shall be changed, nor shall a party who has been represented by a Solicitor be allowed to proceed in person, without the order of a Judge.

Change of Solicitor.
H.T., 1853, R. 4.

See e.g., *Keisor v. Ponder*, (1886) 2 W.N. 112.

21. No Solicitor shall act in any cause, proceeding, or matter in any jurisdiction of the Court for or on behalf of more than one party, unless the parties for whom he acts are in the same interest; and the members of a firm shall, for the purposes of this Rule, be deemed one person.

Solicitors acting for several parties.
7 Nov., 1857,
12 June, 1867.

22. No Solicitor who has ceased to practise for two years continuously shall be allowed to resume practice or to register his name and office as a Solicitor without obtaining an order from the Court.

Solicitor ceasing to practise.
9 Nov., 1900, R. 1

Any person acting in contravention of this Rule may be struck off the Roll of Solicitors.

Penalty.
Ibid. R. 4.

23. Three months' notice of intention to apply for such order must be given to the Secretary to the Solicitors' Admission Board and also to the Secretary to the Incorporated Law Institute.

Notice of application.
Ibid. R. 2.

24. At the time of giving such notice, the applicant must also file an affidavit containing a statement of his place or places of abode since he ceased to practise in New South Wales, and showing how he has been employed in the meantime, and also that he has not done or committed any act or thing which would cause his name to be struck off the Roll of Solicitors.

Affidavit in support.
Ibid. R. 3.

25. No Solicitor shall, without leave of the Court, employ as a clerk, assistant, or writer in or about his business as a Solicitor, any person who has been convicted of any indictable offence.

Convicts not to be employed by Solicitor.
18 Dec., 1877,
R. 31.

26. No Solicitor shall, without leave of the Court, employ as a clerk, assistant, or writer, or in any other capacity, in or about his business as a Solicitor, any person who has been struck off the Roll of Solicitors, or Roll of Certificated Conveyancers, or suspended by the Court from practice as a Solicitor, or as a Certificated Conveyancer, so long as such person remains so struck off the Roll or suspended.

Nor Solicitors or Conveyancers struck off or suspended.
9 May, 1896.

Such leave was granted: *Re Brady*, (1896) 17 N.S.W.R. 312; 13 W.N. 9.

**RULES
27-33.**

Solicitor or
Conveyancer
suspended or
struck off not to
have audience.
30 July, 1863.

Præcipe for
summons.
12 April, 1856,
R. 1.
1 Mar., 1886,
R. 1.

Issue of
summons in
Country towns.
9 Sept., 1891.

Duration of
Writ.
12 April, 1886,
R. 10.

Non-joinder of
plaintiff:
amendment
after notice or
plea in
abatement.
H. T., 1853, R. 6

Particulars
before
appearance.
Ibid. R. 20.

Time limited for
appearance to
specially
indorsed writ.
28 Oct., 1897,
R. 2.
7 June, 1898.

27. No person who has been so struck off the Roll or suspended shall, so long as he remains so struck off the Roll or suspended, be allowed to be heard in any proceeding in the Court as clerk to any Solicitor.

Writ of Summons.

28. No writ of summons shall be issued in any action until a præcipe for the same in the Form No. 1 contained in the First Schedule, has been filed, or, where the writ is issued at any other town, has been delivered to the Commissioner issuing the same, to be by him forthwith transmitted to the Prothonotary.

See C.L.P. Act, s. 4 (*ante*).

29. Every Commissioner for taking Affidavits resident in any town at which the issue of writs has been authorised, or within five miles thereof, who holds the office, or for the time being is discharging the duties of Police Magistrate for such town, or if no one holds such office, or if no one for the time being is discharging such duties for such town, then whoever, being such Commissioner, holds the office, or for the time being is discharging the duties of Clerk of Petty Sessions for such town, may receive præcipes for, and issue writs of summons at such town.

See C. L.P. Act, s. 4, and General Legal Procedure Act, 1902, s. 4, (*ante*).

30. Every writ of summons (including summonses in ejectment) shall be in force for three months. Provided that writs intended for service in any State of the Commonwealth other than New South Wales, or in New Zealand or Fiji, shall be in force for four months; and writs intended for service elsewhere shall be in force for six months.

The time mentioned in the C.L.P. Act and Forms was six months: see C.L.P. Act, s. 12, and 2nd Schedule Forms 1, 3, 4 (*ante*).

"Months" means calendar months, R. 4 (*ante*).

31. Whenever a plaintiff amends the writ after notice by the Defendant, or a plea in abatement of non-joinder, by virtue of the 38th section of the Common Law Procedure Act, 1899, he shall file a consent in writing of the person whose name is to be added, together with an affidavit verifying the signature, and give notice thereof to the defendant, unless the filing of such consent is dispensed with by order of the Court or a Judge.

Particulars.

32. A summons for particulars, and order thereon, may be obtained by a defendant before appearance, and such order may be made, if the Judge thinks fit, without the production of any affidavit.

See as to Particulars, RR. 41 *et seq.*, *post*.

Appearance.

33. The time for the appearance of a defendant after service of a writ of summons, specially indorsed under the 24th section of the Common Law Procedure Act, 1899, shall be—

five days, where every defendant resides in Sydney or not above 100 miles therefrom;

seven days where any defendant resides above 100 miles from Sydney, but within 20 miles from a railway station, or from a post office on a railway line;

ten days, where any defendant resides above 100 miles from Sydney, and above 20 miles from any such railway station or post office.

RULES
33-38.

The terms "railway line" and "railway station" in this Rule shall not include the Lismore-Tweed railway line or any station thereon.

Days.—As to computation of time see RR. 399-402 (*post*).

34. The time for the appearance of a defendant after service of a writ of summons not so indorsed (including summonses in ejectment), shall be—

Time limited for appearance to writ not specially indorsed.
12 April, 1856,
R. 3.
21 May, 1888.

eight days, where every defendant resides in Sydney or not above 100 miles therefrom ;

twelve days, where any defendant resides above 100 and not above 200 miles from Sydney ;

sixteen days, where any defendant resides above 200 miles from Sydney ;

thirty-one days, where any defendant resides in Victoria, Queensland, South Australia (except the Northern Territory thereof), or Tasmania ;

two calendar months, where any defendant resides in Western Australia, the Northern Territory of South Australia, New Zealand, or Fiji ;

four calendar months, where any defendant resides elsewhere.

Days.—As to computation of time see RR. 399-402 (*post*).

35. The defendant shall, on the day upon which he enters an appearance, serve notice thereof upon the plaintiff, in default whereof he shall not be allowed any costs in respect of such appearance.

Notice to be served.

36. If two or more defendants in the same action appear by the same Solicitor, and at the same time, the names of all the defendants so appearing shall be inserted in one appearance.

Appearance by several defendants.
H.T., 1868, R. 2.

37. A Solicitor not entering an appearance in pursuance of his undertaking shall be liable to an attachment.

Undertaking to appear.
ibid. R. 2.

In *Squires v. Weeks*, (1893) 9 W.N. 122, a solicitor, who had given an undertaking to appear, was ordered (on summons) to enter an appearance in pursuance of his undertaking. And in *Darley v. Hyman*, (1894) 15 N.S.W.R. 189 ; 10 W.N. 212, a rule nisi for attachment was made absolute by the Court, although the solicitor alleged that he had no authority to appear.

Pleadings Generally.

38. Every declaration or other pleading shall be signed by the party or his Counsel or Solicitor. Provided that under this Rule the name of any Solicitor may be signed by his clerk, or by the Solicitor acting as his agent, or by any clerk of such agent.

Signature of pleading.
12 April, 1866,
R. 14.
7 Dec., 1891.

The Court has apparently power to make such a Rule under s. 268 of the C.L.P. Act, in spite of s. 68 of the same Act.

In *Australian Brewery Co. v. Eager*, (1890) 7 W.N. 53, the attorney's name was signed to a plea not by himself but by a clerk ; it was held that plaintiff was entitled to treat the plea as a nullity and sign judgment. At that time only the first part of this Rule was in force, and the Rule was subsequently on the 7th December, 1891, amended in accordance with the proviso to the present Rule.

RULES**39-41.**

Time for
declaration.
12 April, 1856,
R. 15.
28 Oct., 1897,
R. 3.

39. After the defendant has appeared, and before the expiration of fourteen days from the last day limited for his appearance, unless a Judge allows further time for that purpose, the plaintiff shall file his declaration, or the defendant may sign a judgment of *non pros*.

Last day for appearance.—See RR. 33, 34. As to computation of time, see RR. 399-402.

A judge allow further time.—Such an application might be made where, e.g., a plaintiff has been unable to serve one or more of several defendants: *Morton v. Grey*, 9 B. & C. 544.

Shall file.—But if defendant has not signed judgment the plaintiff may file his declaration subject to the risk of a motion to take it off the file as irregular; the defendant could not treat such a declaration as a nullity and sign judgment: *Gibson v. Bloomer*, (1890) 7 W.N. 21; on appeal from 6 W.N. 114.

In *Palmer v. Davis*, (1882) T.T.R. 91, a declaration so filed was ordered to be removed from the file as irregularly filed; but this case was finally overruled in *Dobie v. Hay*, (1896) 12 W.N. 115, referring to *Euston v. Massey*, 9 W.N. 158, and *Newling v. Balmain Ferry Co.*, 12 W.N. 29; and the result seems now to be that if judgment of *non pros*. is not signed, plaintiff may file his declaration within the year mentioned in s. 69, C.L.P. Act, *ante*.

Judgment signed a day too soon set aside: *Doust v. Allerding*, (1885) 1 W.N. 130. See *Stitt v. Neill*, 4 W.N. 57; *Briscoe v. Marshall*, 1 W.N. 21.

This Rule is not *ultra vires*, although s. 69 of the C.L.P. Act enacts that a plaintiff shall be deemed out of Court unless he declare within a year after the writ of summons is returnable: *Newling v. Balmain New Ferry Co.*, (1895) 16 N.S.W.R. 225; 12 W.N. 29.

Service.
12 April, 1856,
R. 16.
28 Oct., 1897,
R. 3.

40. Where notice of appearance or notice of bail having been put in, is duly given, the plaintiff shall, within two days afterwards, serve a copy of his declaration on the defendant, if it be then filed, or, if not, then within two days after the same has been filed.

Where declaration was not proved to have been served, judgment signed for want of a plea was set aside: *Stephen v. Isley*, (1884) 1 W.N. 7.

Notice of appearance, R. 35 (*ante*).

Notice of bail.—See R. 242.

Particulars of
demand.
12 April, 1856,
R. 17.

41. In any case where the writ of summons might have been specially indorsed under the 24th section of the Common Law Procedure Act, 1899, but has not been so indorsed, the plaintiff shall file with his declaration (and serve as well as file, in cases where he is bound to serve a copy of the declaration), full particulars of his demand, where they can be comprised within three folios, or, where they cannot be so comprised, such a statement of his demand, and the sum or balance which he claims to be due, as may be comprised within three folios.

Particulars generally.—The Courts have a general jurisdiction to order particulars of demand or of defence: see Chitty's Archbold, 1450 *et seq*.

A defendant should as a general rule apply promptly and before pleading: *Murnin v. United Assurance Co.*, (1867) 6 S.C.R. 262. He may apply before appearance, R. 32 (*supra*).

Plaintiff will not in general be compelled to give particulars of the credit side of the account: Chitty's Archbold, 1456; though a specially indorsed writ should apparently show credits: *Anthony v. Thompson*, (1864) 2 S.C.R. 343; *Golding v. Hill*, (1885) 1 W.N. 129. The best particulars available should be given: *Lasar v. Williamson*, (1884) 1 W.N. 33.

Where credits are given defendant should not plead set-off of such amounts: R. 75

Where the defendant from his position knew the particulars an application was refused: *Tait v. Woods*, (1884) 1 W.N. 61.

Fresh particulars not corresponding with the special indorsement should not be given without a Judge's order; but if such particulars are given, that is not a ground for setting aside the declaration: *Marshall v. A. J. S. Bank*, (1899) 15 W.N. 245.

Better particulars may be ordered: *Chitty's Archbold*, 1457.

As to time for pleading after particulars ordered, see R. 52.

For form of order, see *Chitty's Forms*, 838.

In an action for slander particulars may be ordered of the times when, places where, and persons to whom the slander was uttered: *Byrnes v. Allen*, (1893) 9 W.N. 122; *Aaron v. Gilmore*, (1869) 8 S.C.R. 83; *Clarke v. Lees*, (1896) 12 W.N. 137; *Clinch v. McNamee*, (1892) 9 W.N. 27; and even after issue joined: *Ford v. Holder*, (1900) 17 W.N. 67.

In an action for seduction particulars of times and places were refused, defendant not having denied the seduction on affidavit: *Currens v. Quinn*, (1902) 19 W.N. 277.

As to time for pleading after particulars ordered, see R. 52 (*post*).

Of Plea.—Fuller particulars under an equitable plea of fraud were ordered: *Tooth v. Davis*, (1891) 7 W.N. 39.

42. Until such particulars or statement have been filed (or filed and served, as the case may require), all further proceedings by the plaintiff shall be stayed.

Stay of proceedings until particulars given.
12 April, 1856.

43. Where the declaration contains a special and also a common count in respect of any debt or money demand, but the plaintiff does not in fact seek to recover some distinct and separate debt or demand under the common count other than such as he claims (with or without interest) under the special count, no particulars of demand shall be necessary, but he may resort to the common count at the trial (if otherwise available) notwithstanding.

Where special and common counts joined.
Ibid. R. 19.

44. Where particulars have been filed in accordance with the preceding Rules, or the summons has been duly indorsed in pursuance of the said 24th section, the plaintiff shall not be bound (except at the cost of the defendant) to deliver further or other particulars without a Judge's order.

Further particulars.
Ibid. R. 20.

Further particulars.—R. 41, notes, *ante*.

45. In actions for trespass to land, the close or place in which, &c., must be designated in the declaration by name or abutments or other description, in failure whereof the plaintiff may be ordered to amend with costs, or give such particulars as the Court or a Judge may think reasonable.

Description in actions for trespass.
T.T., 1853, R. 18.

Particulars.—See R. 41, notes, *ante*.

Where a plan was supplied showing the area on which trespasses were complained of (about 5000 acres of land) and dates given between 1st Jan. and 24th Aug., an application for further particulars as to time, place and manner of trespass was refused: *New Zealand Land Association v. Mooney*, (1899) 16 W.N. 89.

46. In actions on policies of insurance, the interest of the assured may be averred thus:—"That A., B., C., and D. (or some or one of them), were or was interested," &c.; and it may also be averred, "that the insurance was made for the use and benefit, and on the account, of the person or persons so interested."

Actions on insurance policies.
Ibid. R. 9.

47. Except as hereinafter provided, several counts on the same cause of action shall not be allowed; and any count used in violation of this Rule may, on the application of the party objecting, within a reasonable time, or before an order made for time to plead, be struck

Joinder of counts.
Ibid. R. 1.

**RULES
47-53.**

out or amended by the Court or a Judge, on such terms as to costs or otherwise as the Court or Judge thinks fit.

Three out of four counts on the same cause of action were struck out : *Stockdale v. Hamilton*, (1865) 4 S.C.R. 313. But where on the facts there is a doubt how the cause of action should be framed they would be allowed : *Howard v. Swindle*, (1899) 20 N.S.W.R. 338 ; 16 W.N. 63.

Common counts
in addition to
special count.
13 April, 1886,
R. 21.

48. The common counts, or any of them, according to the nature of the claim, may in all cases be used in addition to any special count.

Several special
counts.
Ibid.

49. Where the declaration contains any second special count, the same shall not be struck out, although in fact on the same cause of action, if the Court or Judge thinks the use of a second count under the circumstances fair and reasonable.

See *Howard v. Swindle*, (1899) 20 N.S.W.R. 338 ; 16 W.N. 63.

Costs.
Ibid. R. 22.

50. No costs in respect of any such common count or second special count shall in any case be allowed, unless some distinct subject matter has been established under the same.

See *Howard v. Swindle*, (1899) 20 N.S.W.R. 338 ; 16 W.N. 63.

Pleas and Subsequent Pleadings.

Time for
pleading.

51. Where the writ has been specially indorsed under the 24th section of the Common Law Procedure Act, 1899, and where a defendant—

Ibid., RR. 23-4.
28 Oct., 1897,
R. 4.
7 June, 1898.

(a) has duly appeared, and has, on or before the last day limited for appearing, given the plaintiff notice of such appearance, or

(b) has duly put in bail and given the plaintiff notice thereof, the time allowed to him to plead or demur after the service of the declaration, except in cases where it includes counts in respect of causes of action not so indorsed, shall be six days ; or, if the defendant resides above 100 miles from Sydney and above 20 miles from a railway station or from a post office on a railway line, eight days.

Where the writ has not been so indorsed, or where the declaration includes counts in respect of causes of action not so indorsed, the time shall be eight days ; or, if the defendant resides above 100 miles from Sydney, twelve days.

The terms "railway line" and "railway station" in this Rule shall not include the Lismore-Tweed railway line, or any station thereon.

By the C.L.P. Act, s. 73 (*ante*), the time to plead was eight days.

Appearance.—RR. 33 *et seq.*, *ante*.

Bail.—R. 242 (*post*).

As to computation of time, see RR. 399-402 (*post*).

As to default in pleading, R. 56 (*post*).

After delivery of
particulars.
H.T., 1853, R. 21.

52. A defendant shall be allowed the same time for pleading after the delivery of particulars under a Judge's order that he had at the return of the summons, unless otherwise provided for in such order.

Particulars.—R. 41, notes, *ante*, and C.L.P. Act, s. 73, notes, *ante*.

An order had been made giving plaintiff leave to amend his particulars, and further giving defendant liberty to plead afresh, he having already filed a plea of never indebted. Defendant filed further pleas but did not serve a copy the same day ; plaintiff signed judgment ; on motion by defendant judgment was set aside as the plea of never indebted stood on the record : *Lancaster v. Palser*, (1890) 6 W.N. 127.

53. The plaintiff shall have, in all cases, eight days' time to reply. The time for all subsequent pleadings shall be four days.

**RULES
53-58.**

As to computation of time, see RR. 399-402 (*post*).

As to the consequences of not replying, &c., in time, see R. 57 (*post*).

Time for replication and subsequent pleadings. 12 Apr., 1866, R. 25.

Time for joinder in demurrer. *Ibid.*

54. Four days' time shall be allowed, to the plaintiff and defendant alike, for joining in demurrer.

As to computation of time, see RR. 399-402 (*post*).

As to the consequences of not joining in demurrer, see R. 57 (*post*).

55. All pleadings (declarations excepted) shall not only be filed, but a copy thereof shall be on the same day served on the opposite party. In default of such service the same proceedings may be taken by the opposite party as he would have been entitled to take if the pleading had not been duly filed.

Service of pleadings. *Ibid.* R. 27.

As to service of declaration, see R. 40 (*ante*).

A plea not served on the day on which it is filed it may be struck out even though served within the time limited for pleading: *Commercial Bank of Australia v. McRae*, (1894) 10 W.N. 157. But the proper course seems to be to treat the plea as a nullity and sign judgment: *Savage v. Sinclair*, (1898) 14 W.N. 114.

56. After the time limited for pleading, a defendant shall not be let in to plead in any action without the consent of the plaintiff or the leave of a Judge. If a defendant in default pleads without such consent or leave, his plea may be treated as a nullity.

Pleading after time limited. *Ibid.* R. 28.

Before the time for pleading has expired a defendant may obtain *ex parte* a "two day order" extending the time for pleading for two clear days: see R. 301 (*post*).

As to the meaning of two clear days, see *Johns v. Sydney Leather Co.*, (1892) 8 W.N. 100.

An order obtained under R. 56, after the time for pleading has expired, cannot be obtained *ex parte*, and if so obtained and acted on the plea may be treated as a nullity: *Petersen v. Rodgers*, (1897) 13 W.N. 180.

In *Gillespie v. Walher*, (1890) 6 W.N. 142, *Foster, J.*, held that where the last day for pleading fell on a Sunday, the defendant could file his plea next day; (see now R. 402 (*post*)); and further that a demurrer is not a pleading under this rule. But as to this latter point see *contra*, *Commercial Bank of Australia v. O'Shannassy*, (1901) 18 W.N. 232, where *Darley, C.J.*, held that this rule applies to demurrers.

Where a two day order had been obtained without affidavit and without disclosing the fact that two days' further time would give defendant the whole vacation, it was set aside: *Aiken v. Sevenoaks*, (1884) 1 W.N. 2.

In reckoning time for pleading the Sunday intervening between the last day of vacation and the first day of term must be counted: *Stitt v. Neil*, (1887) 4 W.N. 57 (under Rules which provided that time did not run "during vacation.")

57. Where either party fails to join issue, join in demurrer, or answer the last pleading of his adversary within the time allowed, his adversary may sign judgment of *non pros.* or *nil dicit*, unless further time be allowed by a Judge.

Judgment for want of pleading. *Ibid.* R. 29.

This alters the old Rules, as to which, see *McGrath v. Lazarus*, (1890) 6 W.N. 128; *North v. Schulze*, (1890) 6 W.N. 111.

Proctor v. City Bank, (1893) 9 W.N. 112, will probably not now be followed; if the pleading is on the file before judgment it will be allowed to remain: *Gaden v. Harvey*, (1903) 20 W.N. 39; on the analogy of a declaration filed out of time; R. 39 (*ante*).

58. Except as hereinafter provided, several pleas, replications, or subsequent pleadings, or several avowries, or cognizances, founded on the same ground of answer or defence, shall not be allowed.

Pleadings founded on same ground of answer or defence. T.T. 1853, R. 2.

The right to plead several matters is provided for by ss. 90-92 of the C.L.P. Act (*ante*); see those sections. "Hereinafter" seems to refer to R. 59 (*infra*).

RULES**59-64.**

May be allowed
in certain cases.
T.T. 1853, R. 2.

59. On an application to strike out any such pleading on the ground of its being in violation of the last preceding Rule, the Court or a Judge may allow such pleadings founded on the same ground of answer or defence, as appear to the Court or Judge to be proper for determining the real question in controversy between the parties on the merits, subject to such terms as to costs and otherwise as the Court or Judge thinks fit.

Leave to plead.
28 Feb., 1856,
R. 19.

60. Leave to plead or reply several matters, or to plead and demur, may, if the Judge sees fit, be granted *ex parte*.

Although the C.L.P. Act, s. 91 (*ante*), seems to contemplate a summons.

Plead and demur.—C.L.P. Act, s. 89 (*ante*).

Cross-action.
24 Nov., 1860.

61. No plea of cross-action shall be allowed, except on an order obtained by consent, or after a summons to show cause.

See C.L.P. Act, s. 79, and notes, *ante*.

Verification of
pleas where writ
specially
indorsed.
19 Dec., 1901.

62. In any action in which a writ specially indorsed, under the 24th section of the Common Law Procedure Act, 1899, has been issued, no plea to any count in respect of causes of action so indorsed shall be filed without an affidavit to the effect that such plea is true in substance and in fact, or of such facts in verification as a Judge shall deem sufficient in that behalf.

Note that this Rule differs from the Rule of 19th Dec., 1901, in limiting the verification to pleas to counts in respect of the causes of action indorsed.

As to special indorsement, see notes to s. 24 C.L.P. Act.

See the Negotiable Instruments Procedure Act, 1901, and notes thereto, as to verifying pleas. But it is to be observed that by s. 5 of that Statute a plea filed without an affidavit may be treated as a nullity, while there is no such provision in this Rule. The Rule as at first enacted on the 17th July, 1901, contained such a provision: *sed q.* whether that portion of the Rule was not *ultra vires*: *Lewington v. Scottish Union Co.*, (1901) 18 W.N. 275; and afterwards the Rule was re-enacted in its present form.

If under this Rule a plea is pleaded without an affidavit the proper course would appear to be to apply on summons to strike it out.

Where the writ is not properly specially indorsed no affidavit will be required: *Schneider v. Scherf*, (1902) 19 W.N. 59, and other cases cited note to s. 24 C.L.P. Act, *ante*.

Representative
character of
parties not in
issue unless
denied.
13 April, 1856,
R. 40.

63. In actions by or against parties in any representative character, as executors, assignees, or otherwise, or as nominal parties on behalf of some corporation or otherwise, the character stated shall not be considered in issue, unless specially denied.

Plea of "*non
assumpsit*."
T.T. 1853, R. 6.

64. In all actions on simple contract, except as hereinafter excepted, the plea of *non assumpsit*, or a plea traversing the contract or agreement alleged in the declaration, shall operate only as a denial in fact of the express contract, promise, or agreement alleged, or of the matters of fact from which the contract, promise, or agreement alleged may be implied by law.

Exempli gratia.—In an action on a warranty, such pleas will operate as a denial of the fact of the sale and warranty having been given, but not of the breach; and, in an action on a policy of insurance, of the subscription to the alleged policy by the defendant, but not of the interest, of the commencement of the risk, of the loss, or of the alleged compliance with warranties.

In actions against carriers and other bailees for not delivering or not keeping goods safe, or not returning them on request, and in actions against agents for not accounting, such pleas will operate as a denial of any express or implied contract to the effect alleged in the declaration, but not of the breach.

RULES
64-70.

65. To causes of action to which the plea of "never was indebted" is applicable, as provided in the Third Schedule to the Common Law Procedure Act, 1899, and to those of a like nature, the plea of *non assumpsit* shall be inadmissible, and the plea of "never was indebted" will operate as a denial of those matters of fact from which the liability of the defendant arises.

Plea of "never indebted."
T.T., 1853, R. 6.

Exempli gratia.—In actions for goods bargained and sold, or sold and delivered, the plea will operate as a denial of the bargain and sale, or sale and delivery, in point of fact; in the like action for money had and received, it will operate as a denial both of the receipt of money and the existence of those facts which make such receipt by the defendant a receipt to the use of the plaintiff.

66. In all actions upon bills of exchange and promissory notes, the plea of "*non assumpsit*" and "never indebted" shall be inadmissible. In such actions, therefore, a plea in denial must traverse some matter of fact; *exempli gratia*, the drawing, or making, or indorsing, or accepting, or presenting, or notice of dishonour of the bill or note.

Pleas in actions on bills of exchange, &c.
Ibid. R. 7.

67. In every species of action on contract, all matters in confession and avoidance, including not only those by way of discharge, but those which show the transaction to be either void or voidable in point of law, on the ground of fraud or otherwise, shall be specially pleaded. *Exempli gratia.*—Infancy, coverture, release, payment, performance, illegality of consideration either by statute or Common Law, drawing, indorsing, accepting, &c., bills or notes by way of accommodation, set-off, mutual credit, unseaworthiness, misrepresentation, concealment, deviation, and various other defences must be pleaded.

Pleas in confession and avoidance.
Ibid. R. 8.

See *Godwin v. Cashion*, (1878) 1 S.C.R. N.S. 8, where a plea to action on a P.N. alleging merely that defendant never received any value or consideration for the making or payment of the note, was held bad under this Rule.

68. The defences of lien and the Statute of Frauds shall in all cases be pleaded specially.

Pleas of lien and the Statute of Frauds.
12 April, 1886, R. 35.

69. A general pleading of fraud and covin, or of misrepresentation, shall not be allowed in any action; but the party shall plead specially the particular fraud, covin, or misrepresentation meant to be insisted upon.

Fraud to be specially pleaded
Ibid. R. 32.

A general plea of fraud was struck out in *McGarrigle v. Miller*, (1878) 1 S.C.R. N.S. 5.

See also *Tooth and others v. Davis*, (1890) 7 W.N. 39, where further particulars of the fraud were ordered.

70. In actions on specialties and covenants, the plea of "*non est factum*" shall operate as a denial of the execution of the deed in point of fact only, and all other defences shall be specially pleaded, including

Plea of "*non est factum*."
T.T. 1853, R. 10.

**RULES
70-78.**

matters which make the deed absolutely void as well as those which make it voidable.

Plea of "*nil debet*" not allowed.
T.T. 1853, R. 1.

71. The plea of "*nil debet*" shall not be allowed in any action.

Pleas in confession and avoidance,
Ibid. R. 12.

72. All matters in confession and avoidance shall be pleaded specially, as above directed in actions on simple contracts.

Payment to be pleaded.
Ibid. R. 13, 14.
13 April, 1856, R. 20.

73. Payment shall not be received in evidence, in any case, in reduction of the debt or claim, without a plea of payment. Provided that in respect of any sum for which the plaintiff has specifically given credit in his particulars of demand, or in the special indorsement, if any, on the summons, no such plea shall be necessary.

Particulars of set-off and payment.
Ibid. R. 11.

74. In all cases of set-off and payment, the particulars thereof respectively shall be filed, and delivered with the plea, or at such time as a Judge shall allow for that purpose, or such plea may be treated as a nullity.

A plea of payment of a lesser sum in discharge of the debt before it became due is not a plea of payment under this Rule and particulars are not required: *Sly v. Smith*, (1862) 1 S.C.R. 126.

Leave to file particulars with a plea of set-off was granted on affidavit that the particulars had been omitted through inadvertence: *Shelly v. Purcell*, (1899) 15 W.N. 180.

Where no particulars are filed, the proper course is to sign judgment, not to move to strike the plea out: *Savage v. Sinclair*, (1898) 14 W.N. 114.

When pleas of payment and set-off unnecessary.
T.T., 1853, R. 13.

75. In any case in which the plaintiff has given credit in the particulars of his demand for any sum of money which the plaintiff admits the defendant is entitled to set off, it shall not be necessary for the defendant to plead the set-off of such sum. But this Rule is not to apply to cases where the plaintiff does not state the particulars of such set-off.

Plea of right-of-way.
13 April, 1856, R. 26.

76. In every plea alleging a right-of-way, the direction and course thereof shall be described by reference to a plan or chart subjoined or annexed thereto, which shall be taken as part of such plea.

Plea of "*non detinet*."
T.T., 1853, R. 13.

77. In actions for detaining goods, the plea of "*non detinet*" shall operate as a denial of the detention of the goods by the defendant, but not of the plaintiff's property therein; and no other defence than such denial shall be admissible under that plea.

Plea of "*not guilty*" in actions for torts.
Ibid. R. 16.

78. In actions for torts, the plea of "*not guilty*" shall operate as a denial only of the breach of duty or wrongful act alleged to have been committed by the defendant, and not of the facts stated in the inducement, and no other defence than such denial shall be admissible under that plea. All other pleas in denial shall take issue on some particular matter of fact alleged in the declaration.

Exempli gratia.—In an action for a nuisance to the occupation of a house by carrying on an offensive trade, the plea of "*not guilty*" will operate as a denial only that the defendant carried on the alleged trade in such a way as to be a nuisance to the occupation of the house, and will not operate as a denial of the plaintiff's occupation of the house.

In an action for obstructing a right-of-way, it will operate as a denial of the obstruction only, and not of the plaintiff's right-of-way.

In an action for slander of the plaintiff in his office, profession, or trade, it will operate as a denial of speaking the words, of speaking them maliciously, and in the defamatory sense imputed, and with reference to the plaintiff's office, profession, or trade; but it will not operate as a denial of the fact of the plaintiff holding the office, or being of the profession or trade alleged.

RULES
78-85.

In an action for an escape, it will operate as a denial of the neglect or default of the Sheriff or his officers, but not of the debt, judgment, or preliminary proceedings.

In an action against a carrier, it will operate as a denial of the loss or damage, but not of the receipt of the goods by the defendant as a carrier for hire, or of the purpose for which they were received.

79. All matters in confession and avoidance shall be pleaded specially, as in actions on contracts.

Plea in confession and avoidance
T.T., 1853, R. 17.

80. In actions for taking, damaging, or converting the plaintiff's goods, the plea of "not guilty" shall operate as a denial of the fact of the defendant's taking, damaging, or converting the goods mentioned, but not of the plaintiff's property therein; nor shall it put in issue the circumstances which made the act lawful, which must be specially pleaded.

Plea of "not guilty" in actions for conversion, &c.
T.T., 1853, R. 20.
12 April, 1856, R. 41.

81. In actions for trespass to land, the plea of "not guilty" shall operate as a denial that the defendant committed the trespass alleged in the place mentioned, but not as a denial of the plaintiff's possession or right of possession of that place, which, if intended to be denied, must be traversed specially.

Plea of "not guilty" in actions for trespass.
T.T., 1853, R. 19.

82. The denial that the close is the plaintiff's, or that the plaintiff was possessed of the close, shall put in issue only the fact that he had exclusive possession when the defendant entered, but not the circumstances which made the entry lawful, which must be pleaded specially.

Plea of "not possessed."
12 April, 1856, R. 42.

83. Where any such plea is pleaded, with or without "not guilty," such plea shall be taken to refer, for the purposes of the action, to the portion of the locus only proved to have been entered on: Provided that where there is no plea of "not guilty" an entry on some portion of the locus shall be taken to be admitted.

Plea of "not possessed."
Ibid., R. 43.

84. Where the general issue is pleaded by virtue of any statute, such statute and all other enactments, if any, meant to be relied on, shall be noted at the foot of the plea. In case of default, no costs shall be allowed in respect of such plea, or for any witness called to support the same.

General issue by statute.
Ibid., R. 34.

Although the Statute is not noted, that does not prevent the defendant relying on it as a defence; the only penalty is the loss of costs as provided by the Rule: *Calinan v. Railway Commissioners*, (1901) 1 S.R. 89; 18 W.N. 94.

85. A plea alleging matters of defence arising after the commencement of the action may, by leave of a Judge, be pleaded in conjunction with, or after, any plea alleging matters arising before the action, without waiving any previous pleas.

Pleading matters arising after commencement of action.
Ibid., R. 39.

See C.L.P. Act, ss. 77, 78 (*ante*).

RULES 86-92.

Reply to such
pleas, and to
pleas *puis
darrein
continuance*.
12 April, 1856,
RR. 33-9.

86. To any such plea, or to any plea *puis darrein continuance*, the plaintiff may reply by confessing the same; and, in that case, he may tax his costs up to the time of such plea, and sign judgment for the same, if not paid within forty-eight hours; or the plaintiff may deny, or confess and avoid, or demur to, the matter pleaded, in which case the defendant, if he succeeds on the issue raised thereupon, shall be entitled to costs from the time of such plea.

See the C.L.P. Act, ss. 77-78 (*ante*).

See *Cummings v. Russell*, (1867) 6 S.C.R. 368.

Plea of judgment
recovered.
H.T., 1853,
R. 10.

87. Where a defendant pleads a plea of judgment recovered, he shall in the margin of such plea state the date of such judgment, and if such judgment is in a Court of Record the number of the roll on which such proceedings are entered, if any; and, in default of his so doing, the plaintiff may sign judgment as for want of a plea; and if the same is falsely stated by the defendant, the plaintiff, on filing a certificate from the proper officer or person having the custody of the records or proceedings of the Court where such judgment is alleged to have been recovered that there is no such record or entry of a judgment as therein stated, may sign judgment as for want of a plea.

Notice to
produce record.
Ibid. R. 33.

88. On a replication or other pleading denying the existence of a record pleaded by the defendant, a rule for the defendant to produce the record shall not be necessary or used, and instead thereof a four days' notice shall be substituted, requiring the defendant to produce the record, otherwise judgment.

Payment into Court.

Costs where
payment into
Court accepted
in satisfaction.
Ibid. R. 12.

89. When money is paid into Court in respect of any particular sum or cause of action in the declaration, and the plaintiff accepts the same in satisfaction, the plaintiff, when the costs of the cause are taxed, shall be entitled to the costs of the cause in respect of that part of his claim so satisfied up to the time the money is so paid in and taken out, whatever may be the result of any issue or issues in respect of other causes of action; and if the defendant succeeds in defeating the residue of the claim, he shall be entitled to the costs of the cause in respect of such defence, commencing at "Instructions for plea," but not before.

See the C.L.P. Act, ss. 80, 83 (*ante*).

Costs on issue of
debt or damages
ultra.
12 April, 1856,
R. 37.

90. A defendant succeeding on the issue of "no debt or damages *ultra*," shall be entitled to costs from the time of plea pleaded only, or, where leave to pay the money into Court was necessary, from the time of applying for such leave. In either case the plaintiff's costs up to that time shall be deducted from the defendant's costs.

See the C.L.P. Act, ss. 80-83 (*ante*).

Payment into
Court in
consolidated
actions.
H.T. 1853, R. 13.

91. Where money is paid into Court in several actions which are consolidated, and the plaintiff, without taxing costs, proceeds to trial on one and fails, he shall be entitled to costs on the others up to the time of paying money into Court.

Taking money
out of Court.
Ibid. R. 31.

92. No affidavit shall be necessary to verify the plaintiff's signature to the written authority to his Solicitor to take money out of Court, unless specially required by the Prothonotary.

Discontinuance, Stay of Proceedings, &c.

RULES 93–102.

93. The plaintiff may discontinue his action at any time, without rule or order for that purpose, on filing a notice of discontinuance, and giving the defendant notice thereof; upon receiving which, the defendant may get his costs taxed, and if not paid within forty-eight hours, he may sign a judgment of *non pros*. Discontinuance. 12 April, 1856, R. 45.

94. If a defendant at any time desires to pay the plaintiff's claim, he may tender the amount thereof to the plaintiff or his Solicitor, and demand thereupon his bill of costs up to that time, and the Solicitor shall forthwith deliver such bill; and, if required by the defendant, the plaintiff shall have the same taxed; and if the defendant, within forty-eight hours after delivery or taxation of such bill, pays or tenders the amount thereof to the plaintiff's Solicitor, he shall not be charged with any further or higher, costs. Payment of claim and costs. Ibid. R. 47.

95. If such costs are not paid or tendered as aforesaid, the plaintiff may sign judgment for the amount thereof. Judgment for costs.

96. In cases under the 120th section of the Common Law Procedure Act, 1899, the party who succeeds at the trial in the District Court may get his costs, incurred in the Supreme Court, taxed, and in case of non-payment thereof within forty-eight hours sign judgment for such costs. Costs of trespass action stayed and commenced de novo in District Court.

97. In any action against an acceptor of a bill of exchange or the maker of a promissory note, the defendant shall be at liberty to stay proceedings on payment of the debt and costs in that action only. Actions on bills of exchange, &c. H.T., 1853, R. 24.

Security for Costs.

98. An application to compel the plaintiff to give security for costs must, in ordinary cases, be made before issue joined. When application to be made. Ibid. R. 22.

See as to security: Costs, C.L.P. Act, s. 261 (*ante*).

Setting Down for Trial.

99. After issue joined, the plaintiff shall set his cause down for trial, and proceed to trial, at the then next Sittings for causes, in Sydney or at the Circuit town, according as the venue is laid, unless issue has been joined within fourteen days (or, if a Circuit cause, within twenty days) next preceding the first day of such Sittings; in either of which cases the plaintiff need not bring the cause on to trial before the Sittings next but one ensuing. Plaintiff to set causes down for trial. 23 Feb., 1856, R. 19.

See s. 111 C.L.P. Act, *ante*, as to the consequences of default in setting the case down.

100. The issues for trial shall be fairly type-written on white foolscap paper, on one side only, with a margin two and a-half inches wide, and each separate count or plea shall commence a new line, and be numbered consecutively. Issues to be type-written. 3 March, 1891, R. 1.

101. Such issues shall be filed by the plaintiff before the cause is set down, and being signed or stamped by the Prothonotary shall be taken to be the record for the purposes of such trial. If particulars have been filed by either party, a copy of such particulars shall be annexed to the issues and filed therewith. Filing issues and particulars H.T. 1853, R. 19, Ibid. R. 2.

102. All particulars filed, whether of any locality, or of demand, set-off, or other matter, shall be deemed part of the record. Particulars to be deemed part of record. 23 Feb., 1856, R. 25.

RULES**103-111.**

Service of issues.
1 Nov., 1901.

Trial by Judge
without a Jury.

103. The plaintiff, on the day on which the cause is set down, shall serve upon the opposite party a copy of the issues, otherwise the setting down of the cause shall be a nullity.

104. Where the parties consent to any issues of fact being tried, or to the amount of any damages or compensation being assessed by a Judge without a Jury, such consent shall be in writing, and shall be filed by the plaintiff before the trial.

This is under the powers conferred by the Supreme Court Procedure Act, 1900 (*ante*).

Setting down
after new trial
ordered.
28 Feb., 1886,
R. 21.

105. After a new trial ordered, the plaintiff shall set his cause down for trial, and proceed to trial, if practicable, at the then next Sittings in Sydney, or at the Circuit town, as the case may require, unless the Court or a Judge allows further time in that behalf, on such terms as may be thought reasonable.

See s. 111, C.L.P. Act, *ante*; *Ellis v. South British Insurance Co.*, (1891) 8 W.N. 22.

Cause lists.
11 Dec., 1901,
R. 8.

106. For each day of the Sittings for causes in Sydney there shall be three separate Cause Lists, which shall be taken respectively in the Banco, and in No. 1 and No. 2 Jury Courts.

Causes how set
down.
Ibid. R. 7.

107. To the extent limited for each day as next mentioned, causes shall be set down consecutively only. No more than four causes shall be set down in any list for any day for trial in Sydney by a Judge without a jury, or by a jury of four persons, nor more than one cause for trial by a jury of twelve: Provided that an additional number of causes, not exceeding two, may be set down for any day, if the Prothonotary sees fit.

Setting down
out of order.
Ibid. R. 8.

108. Until all lists have been filled in accordance with the last preceding Rule, no cause shall, except by leave of the Prothonotary, be set down in any list for any subsequent day.

Causes for trial
by juries of
twelve.
Ibid. R. 9.

109. Provided that causes for trial by juries of twelve shall be set down for such days only as the Prothonotary shall in each case direct.

Transfer of
causes.
Ibid. R. 12.

110. Causes on the list of any Court may be transferred to the list of any other, by order of a Judge, for trial on the day next but one following, or any later day: Provided that no such day shall be earlier than that for which the cause was first entered.

Trial at Circuit
Courts.
Ibid. R. 14.

111. Causes for trial in any Circuit Court shall be set down for the day fixed in the Law Almanac for holding such Circuit Court. But whenever it appears to the Chief Justice, or to the Judge intending to hold any Circuit Court, that it will not be convenient to hear the civil causes (if any) set down for trial at that Court on the day so fixed, the Chief Justice or such Judge may, not less than sixteen days before the day so fixed, appoint some other day for the trial of such causes, by direction to the Prothonotary; and the Prothonotary shall thereupon forthwith give notice of such appointment to the Solicitors in the said causes, or to their town agents, and also to the Sheriff; and all notices already given between the parties shall hold good and be applied to the day so specially appointed, and all notices and subpoenas to be thereafter given or issued shall be given or issued for that day.

112. All applications to remove a cause from any cause list, or to postpone the trial of a cause, shall, where practicable, be made to a Judge in Chambers, and, where the application is on the ground of the absence of any witness, there shall be an affidavit stating the matters which he is expected to prove.

See s. 112, C.L.P. Act, *ante*.

**RULES
112-119.**

Removal from list, or postponement of cause.
23 Feb., 1856,
R. 30.

113. When any sittings for causes are postponed, the date for the trial of any cause specially fixed shall also be postponed for the same number of days as that for which the sittings have been postponed, unless a Judge shall otherwise order.

Postponement of sittings.
11 Dec., 1901,
R. 10.

114. All causes remaining untried at any sittings shall be set down by the Prothonotary, each according to its appropriate list, for the then next sittings; and no new notice of trial, or to produce documents, shall be necessary. Every such cause shall have precedence over causes previously set down for those sittings.

Remanets.
23 Feb., 1856,
R. 10.
Ibid. R. 12.

Venue.

115. Every declaration shall be marked in the margin with the name of the town, being either Sydney or some Circuit town, where it is intended that the cause shall be tried, and such town shall be the venue for trial, unless the Court or a Judge shall otherwise order.

See C.L.P. Act, s. 70, and Form there referred to, and s. 108 (*ante*).

Venue.
12 April, 1856,
RR. 11, 12.
6 Dec., 1865,
RR. 1, 2.

116. No venue shall be changed without a special order of the Court or a Judge, unless by consent of the parties.

See C.L.P. Act, s. 108 (*ante*).

Venue not to be changed without order.
H.T., 1853, R. 18

117. Where it is made to appear, on application to a Judge, that any cause set down for trial at Sydney, or in which the venue is there laid, may—having reference to the nature of the case, or the residence of the witnesses, or other circumstances—be more advantageously tried on Circuit, an order may be made (on such terms as the Judge thinks reasonable) for the trial to take place at such Circuit town as the Judge shall appoint. Where any cause has been set down for trial, or the venue therein laid, at any Circuit town, an order may in like manner be made for the trial thereof at any other Circuit town or in Sydney.

See C.L.P. Act, s. 108 (*ante*), and cases there cited.

Order for change of venue.
23 Feb., 1856,
R. 32.

Notice of Trial, &c.

118. Eight clear days' notice of trial (except in the cases next mentioned) shall be given in all cases. But where any defendant resides above 100 and not above 200 miles from Sydney, the number of such days shall be twelve; and where any defendant resides above 200 miles from Sydney, the number of such days shall be sixteen.

Notice of trial
Ibid. R. 13.

Clear days.—See as to computation of time, RR. 399-402 (*post*).

See *Small v. Madgwick*, (1878) 1 S.C.R.N.S. 251.

Plaintiff in person cannot give notice where there is an attorney on the record : *Keisor v. Ponder*, (1886) 2 W.N. 112.

119. Short notice of trial shall be half the number of clear days prescribed for ordinary notice of trial.

Short notice of trial.
Ibid. R. 14.

RULES**120-126.**

Notice of
continuance.
H.T., 1853, R. 26.

120. Notice of trial may be continued to the Sittings next after the Sittings for which such notice was originally given, by giving a notice of continuance four days before the time mentioned in the notice of trial. Provided that, if short notice of trial has been given, two days' previous notice shall be sufficient, unless otherwise ordered by the Court or a Judge, or by consent.

As to computation of time see RR. 399-402 (*post*).

Countermand of
notice of trial.
23 Feb., 1866,
R. 16.

121. Countermand of notice of trial (except in the cases next mentioned) shall be given four clear days before the time mentioned in the notice of trial. But where any defendant resides above 100 and not above 200 miles from Sydney, the number of such days shall be six, and where any defendant resides above 200 miles from Sydney the number of such days shall be eight.

As to computation of time see RR. 399-402 (*post*).

See s. 110, C.L.P. Act, *ante*.

Where notice to
be given.
Ibid. R. 24.

122. Notice of trial or of continuance of trial and countermand of notice of trial may be given either in town or country, unless otherwise ordered by the Court or a Judge.

Costs of the day.
Ibid. R. 39.

123. The costs of the day for not proceeding to trial may be obtained by a side-bar rule on the usual affidavit.

See s. 110, C.L.P. Act, *ante*.

Notice to
proceed to trial.
Ibid. R. 16.

124. The number of days' notice to a plaintiff, under the 111th section of the Common Law Procedure Act, 1899, shall, instead of twenty as prescribed by the said section, be—

eight, where every plaintiff resides in Sydney, or not above 100 miles therefrom ;

twelve, where any plaintiff resides above 100 and not above 200 miles from Sydney ;

sixteen, in all other cases.

See as to computation of time, RR. 399-402 (*post*) ; and notes to s. 111 (*ante*).

Proceedings
after lapse of a
year.
H.T., 1853,
R. 176.

125. In all causes in which there have been no proceedings for one year from the last proceeding had, the party, whether plaintiff or defendant, who desires to proceed shall give a calendar month's notice to the other party of his intention to proceed. The summons of a Judge, if no order be made thereupon, shall not be deemed a proceeding within this Rule. Notice of trial, though afterwards countermanded, shall be deemed a proceeding within it.

Jury.

Application for
jury of twelve.
23 Feb., 1866,
R. 17.

126. Where either of the parties in a cause desires to have the same tried by a jury of twelve persons, he shall give two clear days' notice of his intention to move for such jury, specifying the class of jurors for which he intends to apply, and referring to the affidavit or affidavits intended to be used (of which he shall serve a copy with his notice), for the grounds of such motion.

Two clear days.—See RR. 399-402 (*post*).

See the Jury Act, 1901, s. 31.

By the practice of the Court either party is entitled as a matter of right to a common jury of twelve : *Ritchie v. D'Arcy*, (1900) 17 W.N. 93 ; *Cowlshaw v. McLeod*, (1898) 14 W.N. 189 ; *McLaughlin v. Bennett*, (1890) 6 W.N. 112.

The application may be too late. In *Allen v. Willis*, (1895) 11 W.N. 192, issue was joined on May 3rd, and the case set down to be tried on June 12th. The application was part heard on June 14th, and finally heard on June 17th, when the case was in the day's list for hearing, and was refused.

**RULES
126-136.**

In *McElhone v. Bennett*, (1885) 1 W.N. 115, it was held that the old Rule limiting the time for application to "within ten days after issue joined" was *ultra vires*, as opposed to the provisions of the (present) s. 31 of the Jury Act, 1901.

As to the principles guiding the Court in granting applications for a special jury of twelve, see *McElhone v. Bennett*, (1885) 1 W.N. 115; *Taylor v. Young*, (1886) 2 W.N. 108; *McLaughlin v. Bennett*, (1889) 6 W.N. 15; *ibid.* (1890) 6 W.N. 112.

127. If no civil cause has been set down and notice of trial given, and notified to the Prothonotary, for any Circuit Court, up to the sixteenth day before the day named in the Law Almanac for the trial of civil causes thereat, no jury shall be summoned to such Court for the trial of civil issues without the leave of a Judge, and the Prothonotary shall give notice to the Sheriff accordingly.

Jury not to be summoned to Circuit Courts where no causes set down.
11 Dec., 1901, R. 15.

128. Where an order for a jury of twelve is made at the instance of the defendant, the amount of jury fees required by the 77th section of the Jury Act, 1901, shall be paid by him within forty-eight hours after such order, or the same shall wholly lapse.

Fees payable by defendant.
23 Feb., 1886, R. 46.

129. The amount of all jury fees shall be accounted for by the Prothonotary as in the case of other public moneys coming to his hands.

Fees to be accounted for by Prothonotary.
Ibid. R. 47.

Subpoenas.

130. Every Commissioner empowered under these Rules to issue writs of summons may also issue writs of subpoena in any cause or case, civil or criminal. Provided that no such subpoena shall contain more than four names.

Issue of subpoenas at Country towns.
7 April, 1866, R. 5.

See Rules Commissioner.—See R. 29 (*ante*).

131. No writ of subpoena shall be issued in any jurisdiction of the Court for the production of original records of the Court.

No subpoena for production of records.
10 Dec., 1901 R. 1.

132. Before any original records of the Court are produced, an order of a Judge for their production must be served upon the officer who has charge of such records.

Order for production.
Ibid. R. 2.

133. Such order must be taken out in the action, suit, cause, or proceeding in which the production of such records is required.

Title of order.
Ibid. R. 3.

134. An officer served with such an order shall be entitled to the same expenses as he could have claimed if he had been served with a writ of subpoena.

Expenses.
Ibid. R. 4.

Notice to Admit.

135. The form of notice to admit documents, referred to in the 105th section of the Common Law Procedure Act, 1899, may be in the Form No. 2 contained in the First Schedule.

Form.
H.T., 1853, R. 29

See s. 105, and notes, *ante*.

136. In all cases of trials, writs of inquiry, or inquisitions of any kind, either party may call on the other party, by notice, to admit documents in the manner provided by and subject to the provisions of the Common Law Procedure Act, 1899, and in case of refusal or neglect

Notice to admit may be given in all cases.
Ibid. R. 30.

RULES
136-143.

to admit after such notice given, the costs of proving the document shall be paid by the party so neglecting or refusing, whatever the result of the cause may be, unless at the trial or inquisition the Judge or Presiding Officer certifies that the refusal to admit was reasonable; and unless such notice is given, the costs of proving any document shall not be allowed except in cases where the omission to give the notice is, in the opinion of the Prothonotary, a saving of expense.

See s. 105, C.L.P. Act, *ante*.

Evidence on Commission.

Costs of application for Commission, &c.
28 Feb., 1856,
R. 28.

137. Upon any application for a commission, rule, or order, under the 4th section of the Witnesses Examination Act, 1900, the costs of the application shall be in the discretion of the Court or Judge.

See that Act, *ante*.

The old Rule referred to in the side note was in different terms. Under that Rule costs of an unopposed application have been allowed against the applicant: *Mitchell v. Nelson*, (1900) 17 W.N. 16; but costs of appearance on the summons to consent were refused in *Vale of Clwydd C.M. Co. v. Christie*, (1887) 4 W.N. 56, costs being allowed only as on an unopposed application.

Under special circumstances a party unsuccessfully opposing the order has been given costs of the application: *McCulloch v. Browne*, (1887) 4 W.N. 70, and costs of the commission itself were made defendant's (opponent's) costs in the cause.

See also Witnesses' Examination Act, 1900, s. 12.

Transmission of certified copy of Commission.
1 Dec., 1857,
R. 3, 4.

138. Where any commission for the examination of witnesses is issued to any place not within the Commonwealth or New Zealand, the party joining therein may transmit a certified copy of such commission, and cause the same to be executed if he thinks fit. Provided that the costs of such execution shall not be allowed as costs in the cause if the original commission be also executed.

Depositions to be filed.

H.T., 1852, R. 33.

139. All depositions of witnesses taken under any such commission, rule, or order, shall be returned to the Court and filed.

Cause Papers.

Daily cause papers to be prepared.
28 Feb., 1856,
R. 29.

140. For each day of the Sittings for causes in Sydney a separate Cause Paper shall be prepared for the Banco Court and each of the Jury Courts, and a copy thereof shall, before each day's sitting, be exhibited in the Entrance Hall; and no cause shall be called on unless it is in the cause paper for that day.

Proceedings at Trial.

Papers in cause may be put in evidence.
Ibid. R. 26.

141. Any paper in the cause (including any writ, præcipe, affidavit, or Judge's order) which may be required by either party may, at his instance, be delivered to the Clerk of the Court, and on production by him, may be read in evidence without other proof.

Custody and return of papers.
Ibid. R. 37.

142. Where the issues and other papers have been so delivered, the clerk receiving them shall be responsible for their safe custody and return to the Prothonotary, or (where the cause still remains for trial) for their delivery to the clerk next in attendance, and every clerk delivering or redelivering any such pleading or paper shall obtain a receipt for the same.

Custody of exhibits.
Ibid. R. 38.

143. The clerk in Court shall also be responsible for the safe custody of all exhibits put in evidence, and he shall not deliver them

to any person other than the Prothonotary without a Judge's order. On such delivery he shall obtain a receipt for the same.

RULES
143-150.

144. All causes shall be called on for trial in the order in which they are entered in the cause paper, unless the presiding Judge otherwise orders.

Priority of causes.
23 Feb., 1856,
R. 23.

145. Any cause not concluded on the last day of the sittings may be continued on such day or days as the presiding Judge thinks fit.

Part-heard causes.
11 Dec., 1901,
R. 11.

146. Where the whole of the plaintiff's case is admitted on the record, the defendant shall at the trial be entitled to begin whatever may be the nature of the action: Provided that where the amount only of damages, or of the debt, is in question, the plaintiff shall be entitled to begin.

Right to begin.
23 Feb., 1856,
R. 34.

See s. 115, C.L.P. Act, and notes, *ante*.

147. Every verdict shall be immediately noted down by the Associate and read in open Court, and shall be entered in the Prothonotary's book.

Entry of verdict.
Ibid. R. 25.

A special verdict might be taken by consent or in cases under s. 116 or s. 126 of the C.L.P. Act. Any such verdict is now, however, usually noted by the Judge at once.

The note taken by the Clerk of the Court and entered in the Prothonotary's book practically corresponds to the *postea* which was formally entered on the *nisi prius* record; but the formal record is now seldom made up. The *postea* may be amended in a proper case even after the amount of the verdict has been paid: *Hutchinson v. Australian Newspaper Co.*, (1899) 15 W.N. 318.

Writs of Inquiry and of Trial.

148. The practice in relation to Writs of Inquiry and Writs of Trial under the 121st section of the Common Law Procedure Act, 1899, shall be the same, as nearly as may be, as was formerly observed in England under the Act 3 and 4 Will. IV., c. 42, s. 17, in the case of writs of the like nature directed to the Sheriff.

Practice.
12 April, 1856,
R. 48.

149. Provided that every such writ shall be under the signature of a Judge, and that no order or other authority for the issue thereof shall in any case be necessary.

Writs to be signed by Judge.
Ibid. R. 49.

New Trial, &c.

150. Where either party intends to move for a nonsuit, or for a new trial, or in arrest of judgment, or for judgment *non obstante veredicto*, or for a *venire de novo*, or to enter a verdict, or to increase or reduce the amount of the verdict, whether on any point reserved at the trial or not, he shall within eight days (or in causes tried at a Circuit town or at a District Court above 100 miles from Sydney, within fourteen days) after the trial file a memorandum of such intention, together with all affidavits to be used in support of the motion, and shall at the same time lodge with the Prothonotary three additional copies of such memorandum. Provided that any such affidavit may be filed afterwards by leave of the Court or a Judge.

Memorandum and affidavits.
19 August, 1861,
RR. 4, 6.
21 May, 1888,
R. 1.
11 Dec., 1901,
R. 19.

If the memorandum is filed out of time the motion for new trial will not be entertained: *Barbour v. Jones*, (1880) 1 N.S.W.R. 345; even though counsel erroneously advised that it was not necessary to file a memorandum, leave to file it (applied for after the time for filing had expired), was refused: *Ricketson v. Barbour*, (1877)

**RULES
150-154.**

Knox 453. But where the memorandum was filed out of time, if time ran in vacation, which was doubtful, the Court allowed the motion to proceed: *White v. A.U.S.N. Co.*, (1892) 9 W.N. 6; see *Cox v. Bath*, (1893) 9 W.N. 176. And where a formal verdict had been taken and certain admissions of fact made and by agreement all questions of law had been reserved for the Court, but defendant had neglected to file a memorandum in time, the Court under the special circumstances allowed it to be filed *nunc pro tunc*: *Morris v. Solling*, (1889) 6 W.N. 76.

Eight days.—Time for filing the memorandum runs in vacation; see Rules for the Dispatch of Business, Almanac, 1903, and R. 10 (*ante*). See generally as to computation of time, RR. 399-402 (*post*).

151. Every such memorandum shall state the day or days on which the cause was tried, the verdict given or other termination of the trial, the motion intended to be made, and the several grounds on which it will be made; and, where the party had Counsel at the trial, shall be signed by one of such Counsel.

Where a memorandum was signed by the attorney and not by counsel, though counsel had appeared at the trial, the case was struck out: *Wakely v. Quinn*, (1885) 2 W.N. 28. The original draft must be signed; the copy filed must bear counsel's name: *Dennis v. Horsley*, (1885) 2 W.N. 36; *Cross v. Goode*, (1887) 3 W.N. 100; 8 N.S.W.R. 255.

Counsel who was at the trial must sign: *Wentworth v. Hill*, (1890) 7 W.N. 4; where an attorney appeared at the trial the Rule does not apparently apply: *Jenkins v. Douglas*, (1891) 7 W.N. 95.

See also *Jones v. Jones*, (1898) 19 N.S.W.R. Div. 12; 14 W.N. 209.

152. On or before the last day allowed for filing such memorandum, the moving party shall order a copy of the Judge's notes, and within eight days after receiving the same shall lodge with the Prothonotary four printed copies thereof, and shall also within the same time, serve a like number of such printed copies upon each opposing party, or upon each solicitor on the record: Provided that a Judge may extend the times for ordering, lodging, and serving copies of such notes, or may dispense with the ordering and printing of such notes.

As to computation of time see RR. 399-402 (*post*).

The notes need not be filed till within eight days after receiving a corrected copy if they have been referred back for correction: *Lingard v. Taylor*, (1902) 19 W.N. 105.

Where the party moving for a rule *nisi* had failed to file the notes in time under this Rule, the case was struck out, even though the other side appeared on the rule *nisi* and waived the objection: *Cheney v. Bardwell*, (1901) 18 W.N. 4; although in *Erwin v. Strand Electric Lighting Co.*, (1899) 16 W.N. 49, and *Davis v. Goode*, (1889) 6 W.N. 46, it was held too late to take the point on the rule absolute.

The application to a Judge for further time must be made before the time fixed by the Rule has elapsed: *Zobel v. Croudace*, (1899) 16 W.N. 32.

Counsel should appear on the rule *nisi* and point the facts out to the Court: *Zobel v. Croudace*, *supra*.

153. All causes in which such memorandum has been filed shall be entered in the order of filing, and except as hereinafter provided shall be called on in that order on every day in term until disposed of.

154. Provided that no matter in which printed copies of the Judge's notes have under these Rules to be lodged shall be called on for hearing before the expiration of the time allowed for lodging such copies, except by direction of the Court or a Judge at the request of the moving party, and that where the cause has ended during the term, or within four days preceding the term, no motion in pursuance of such memorandum need be made earlier than the fourth day after the filing thereof.

Contents of
memorandum.
19 Aug., 1861,
R. 6.

Judge's notes to
be printed,
lodged, and
served.
21 May, 1888,
R. 2.

Setting down
for hearing.
11 Dec., 1901,
R. 17.

Extension of
time in certain
cases.
21 May, 1888,
R. 5.
11 Dec., 1901,
R. 19.

155. Every motion in pursuance of such memorandum shall be for a rule *nisi*. Upon such motion the moving party shall be restricted to the grounds specified in the memorandum, and if such rule be granted, the grounds upon which it is granted shall be shortly stated therein.

**RULES
155-161.**

Motion for Rule *Nisi*.
19 Aug., 1861,
R. 8.

Grounds.—See generally s. 160 and notes, C.L.P. Act, *ante*. The grounds taken in the rule *nisi* may be amended on the hearing of the motion to make the rule absolute: *Trafford v. Pharmacy Board*, (1902) 2 S.R. 418; 19 W.N. 281; but see *Howarth v. Walker*, (1902) 2 S.R. 452; *Howard Smith v. A.S.N. Co.*, (1885) 2 W.N. 12.

156. Every rule *nisi* for a new trial shall be taken out, filed and served within seven days after it has been granted, and at the time of filing three additional copies shall be lodged with the Prothonotary, otherwise it shall be held to have lapsed, and the Prothonotary shall thereupon strike the case out of the Term book.

Filing and service.
21 May, 1888,
R. 1.
11 Dec., 1901,
R. 21.

Seven days.—As to computation of time see RR. 399-402 (*post*).

157. The Associate of the Judge who tried the cause shall attend the Court on the motion to make such rule absolute, with the issue and exhibits and Judge's notes, and shall discharge thereafter the duties of the Prothonotary in respect of such rule until the same is disposed of.

Associate to attend on argument.
7 July, 1870.

158. Where a memorandum for a new trial has been filed, or a rule *nisi* in pursuance thereof granted, if no motion is made when the case is called on, such case shall (unless the Court extends the time) be struck out of the paper, with leave to the adverse party to sign judgment.

Case to be struck out if no motion made.
11 Dec., 1901,
R. 18.

159. Where a new trial is granted (except on the ground that the verdict was against evidence) without mention of costs, each party shall bear his own costs of the first trial. Where the costs of the first trial are ordered to abide the event, such costs shall not be allowed to the finally successful party unless he succeeded on both trials. The costs of the motion shall in all cases follow the event of the second trial, unless the Court otherwise orders.

Costs where new trial granted.
23 Feb., 1856,
R. 42.

See ss. 160, 161, and notes C.L.P. Act, *ante*; and see *Wilson v. Tarrant*, (1888) 5 W.N. 43, where costs of the motion were refused because "the point was not taken clearly and definitely as now at the trial."

Where in a libel action a new trial was ordered on the question of damages only, nothing being said as to the costs of the first trial, the plaintiff was held entitled to those costs, this rule not applying to such a case: *Limon v. Bennett*, (1901) 18 W.N. 283.

The Privy Council will not interfere with the discretion of the Court here as to the costs of the new trial motion: *Campbell v. Commercial Bank*, (1879) 2 N.S.W.R. 388.

160. Where execution has issued, the Court may, nevertheless, vacate the judgment and set aside or stay such execution, and, by rule, order, or writ for that purpose, cause restitution to be made, in such manner and on such terms as may be thought just.

Setting aside judgment and execution.
19 Aug., 1861,
R. 12.

As to stay of execution see C.L.P. Act, s. 134 (*ante*), and R. 188 (*post*).

Exhibits.

161. No officer of the Court having the custody of exhibits put in evidence in any action, suit, proceeding, or matter in any jurisdiction of the Court, shall in any case part with the possession thereof without the order of a Judge.

Exhibits not to be taken out without order.
3 Aug., 1887.

RULES**162-169.**

Grounds of
demurrer or
objection to
pleading.
12 April, 1886,
R. 23.

162. In the margin of every demurrer the points intended to be raised for argument shall be shortly stated; and where the party joining in demurrer intends to object to his adversary's pleading he shall state such intention, and the points intended to be relied on by him, in the margin of his joinder in demurrer.

See C.L.P. Act, s. 100, and notes.

Where a point was not stated in the margin, counsel was allowed to state it, but not to argue it: *Metcalf v. Holdsworth*, (1894) 10 W.N. 222; and see *Barlow v. Woolcott*, (1869) 8 S.C.R. 367.

Where plaintiff had demurred to the rejoinder he was allowed on the argument to contend that the plea was bad: *Lyons v. Samuel*, (1877) Knox 177.

On cross demurrers plaintiff begins: *Perry v. Towns*, (1862) 1 S.C.R. 73.

Contents of
Demurrer-book.
H.T. 1883, R. 17

163. When there is a demurrer to part only of the declaration or other pleadings, those parts only of the declaration and pleadings to which such demurrer relates shall be copied into the demurrer-book; and if any other parts are copied, the costs thereof shall not be allowed on taxation, either as between party and party or as between Solicitor and client.

See *Metcalf v. Holdsworth*, (1894) 10 W.N. 222.

Setting down
demurrers and
special cases.
1 March, 1886,
R. 22.

164. The Prothonotary shall set down demurrers and special cases for argument so soon as the demurrer-book or the case as settled has been filed.

Where no demurrer book had been filed the case was struck out: *Israel v. Turner*, (1893) 10 W.N. 66.

Plaintiff has the carriage of a demurrer; where defendant sets it down it will be struck out by the Court, at any rate if notice of the objection has been given: *Freeman v. Withers*, (1877) Knox 6; *Municipal District of Rockdale v. Knight*, (1896) 13 W.N. 10. But if plaintiff fails to set down the demurrer, defendant may obtain a Judge's order giving him leave to do so: *Bead v. Berrick*, (1899) 15 W.N. 192.

And see now R. 166 (post).

Demurrer-book
to be lodged and
served.
1 Nov., 1901.

165. The party filing a demurrer-book shall at the same time lodge with the Prothonotary three copies thereof, and shall on the same day serve a copy thereof upon the opposite party; otherwise the setting down of such demurrer shall be a nullity.

Leave to
defendant to
file demurrer-
book.

166. If the plaintiff fails to file the demurrer-book for a period of twenty days after joinder in demurrer, the Court or a Judge may allow the defendant to file the demurrer-book.

Printed or type-
written copies of
special case to be
lodged and served.
19 Dec., 1889,
R. 1.

167. The party filing a special case stated under the Common Law Procedure Act, 1899, shall at the same time lodge with the Prothonotary three printed or type-written copies of such case, and shall on the same day serve four printed or type-written copies thereof upon each opposing party: Provided that no carbon copies shall be filed or lodged.

See ss. 55, 221, of the C.L.P. Act, *ante*.

Judgment.

No rule
necessary.
H.T. 1883, R. 55.

168. No rule for judgment shall be necessary.

Signing judg-
ment for
plaintiff.
6 Mar., 1886,
R. 1.

169. The plaintiff having obtained a verdict, may sign judgment thereafter at the expiration of—

eight days, where every defendant resides in Sydney, or not above 100 miles therefrom ;
 twelve days, where any defendant resides above 100 and not above 200 miles from Sydney ;
 sixteen days, in all other cases.

RULES
169-175.

As to computation of time see RR. 399-402 (*post*).

As to judgment in ejectment, see notes to s. 228, C.L.P. Act.

Signing judgment too soon is an irregularity which may be waived, as by the attendance of the attorney on taxation : *Howard v. Neeld*, (1900) 17 W.N. 64 ; *Blaxland v. Grattan*, (1886) 3 W.N. 4.

Execution may issue forthwith on signing judgment, R. 182 (*post*).

As to speedy execution and stay of execution, see s. 134 C.L.P. Act, and R. 188 (*post*).

170. Any defendant, after having obtained a verdict, or after the plaintiff has been non-suited, may sign judgment at the expiration of a like number of days, having regard to the residence of the plaintiff or plaintiffs severally.

Signing judgment for defendant.
 6 Mar., 1856, R. 2.

See R. 169 (*supra*).

171. On a reference to the Prothonotary to ascertain the amount for which final judgment is to be signed, the Prothonotary's certificate shall be filed before judgment is signed.

On reference to Prothonotary, certificate to be filed.
 H.T. 1853, R. 171.

See s. 129, C.L.P. Act, *ante*.

172. In actions where the defendant has appeared by Solicitor, no consent order for signing judgment shall be made unless the consent of the defendant be given by his Solicitor or the agent of such Solicitor.

Consent to be given by Solicitor.
Ibid. R. 156.

173. All judgments, whether interlocutory or final, shall be entered of record of the day of the month and year, whether in or out of Term, when signed, and shall not have relation to any other day. Provided that it shall be competent for the Court or a Judge to order a judgment to be entered *nunc pro tunc*.

Date of judgment.
Ibid. R. 56, T.T., 1853, R. 32.

See C.L.P. Act, s. 133 (*ante*).

174. It shall not be necessary to enter the proceedings in an action on the Roll in any case before issuing execution ; but an incipitur may be made as on a judgment under the Common Law Procedure Act, 1899, upon which judgment may be signed, the costs taxed, and execution issued as upon a judgment duly enrolled. Provided that the proceedings may be entered on the Roll whenever necessary for the purpose of evidence or of an appeal.

Incipitur of judgment.
 22 March, 1856.

See C.L.P. Act, s. 133 (*ante*).

175. In order to acknowledge satisfaction of a judgment, it shall be sufficient to file a satisfaction piece in the Form No. 3, contained in the First Schedule, signed by the party acknowledging the same, or his personal representative, and such signature shall be witnessed by a practising Solicitor, expressly named by him, and attending at his request to inform him of the nature and effect of such satisfaction piece before the same is signed ; and such Solicitor shall declare himself in the attestation thereto to be the Solicitor for the person so signing the same, and state that he is witness as such Solicitor : Provided that a Judge may make an order dispensing with such signature under special circumstances if he thinks fit. Where the satisfaction piece is signed by the personal representative of a deceased, his representative character shall be proved in such manner as the Prothonotary may direct.

Acknowledgment of satisfaction.
 H.T., 1853, R. 80.

**RULES
176-183.**

Warrant of
attorney subject
to defeasance.
H.T., 1853, R. 27.

Warrants of Attorney and Cognovits.

176. Every Solicitor or other person who prepares any warrant of attorney to confess judgment, which is to be subject to any defeasance, shall cause such defeasance to be written on the same paper or parchment on which the warrant is written, or cause a memorandum in writing to be made on such warrant containing the substance and effect of such defeasance.

As to cognovits and warrants of attorney see Chitty's Archbold, 942, 949.

Warrants and
cognovits to be
recorded within
time limited.
8 May, 1856,
RR. 1-3.

177. Every warrant of attorney to confess judgment, and every *cognovit actionem*, shall be recorded in the Prothonotary's Office according to the form now in use within ten days—or if executed beyond 50 and not beyond 100 miles from Sydney, within fifteen days—or if executed beyond 100 miles from Sydney, within twenty days—after the execution thereof; otherwise no judgment thereon shall be entered up without leave of the Court or a Judge.

Unless judgment
previously
entered up.
Ibid. RR. 2-3.

178. Provided that nothing in the last preceding rule shall apply to any warrant or *cognovit* upon which judgment is entered up within the times so limited.

Warrants to be
executed in
presence of
Solicitor or J.P.
6 March, 1856,
R. 8.

179. Judgment shall in no case be signed on any warrant of attorney unless such warrant is executed in the presence of a Solicitor or of some Justice of the Peace residing near the place where such warrant is executed; and such Solicitor or Justice shall certify on such warrant that before execution thereof he cautioned the party about to execute the same as to the nature and consequences of his act.

The like as to
cognovits.
Ibid. R. 9.

180. The last preceding Rule, except as to the certificate therein mentioned, shall equally apply to every *cognovit actionem*.

Judgment on
old warrants.
H.T., 1853, R. 26.

181. Leave to enter up judgment on a warrant of attorney above one and under ten years old is to be obtained by order of a Judge made *ex parte*; and if ten years old or more, upon a summons to show cause.

Execution.

Execution on
final judgment.
6 March, 1856,
RR. 1-3.

182. Either party having signed final judgment may issue execution forthwith.

See C.L.P. Act, s. 134 (*ante*).

Account to be
filed in certain
cases.
Ibid. RR. 3-6.

183. Provided that before suing out execution—

- (a) on any judgment obtained under the 25th section of the Common Law Procedure Act, 1899; or
- (b) on any judgment entered up in pursuance of any warrant of attorney or *cognovit actionem*; or
- (c) on any judgment more than one year old; or
- (d) on any judgment by default in an action for a debt or liquidated demand where there has been no assessment or order for calculation of damages,—

the creditor shall file an account of what is justly due to him under the judgment, or where, from the nature of the demand, an account is inapplicable, or where the account would exceed three folios, he may file a statement of the demand.

(b) See RR. 176 *et seq.*, *ante*.

(c) See s. 138, C.L.P. Act, *ante*.

(d) See s. 26, C.L.P. Act, *ante*.

Execution issued without an affidavit of debt was set aside : *Briscoe v. Forsyth*, (1887) 3 W.N. 127. But the omission is an irregularity only which may be waived, as, by delay : *Edginton v. Tingle*, (1888) 4 W.N. 127 ; and see *McDonald v. Gagan*, (1884) 5 N.S.W.R. 78.

See also *Pennington v. Manby*, (1862) 1 S.C.R. 349.

These rules as to affidavit of debt do not apply to corporations aggregate : *Bank of N.S.W. v. Tucker*, (1863) 2 S.C.R. 252.

RULES 183-191.

184. Every such account or statement shall be verified on the oath of the creditor, or if he is absent from New South Wales on the oath of his agent or attorney, to the best of such agent or attorney's belief. Account to be verified.
6 March, 1886,
R.R. 2-5.

185. Where the creditor is a corporation, such account or statement shall be verified on the oath of an officer, agent, or attorney of such corporation. Where creditor is a corporation

186. In every case in which such verified account or statement is required to be filed before execution issued, a like account or statement shall be necessary before the issue of every writ of execution or renewal thereof : and no such account or statement shall be effectual unless such writ is sued out or renewed within ten days after such account has been so verified, or within such further time as the Court or a Judge shall allow. The like account before every writ or renewal.
Ibid. R. 7.
30 June, 1860.

See *Edginton v. Tingle*, (1888) 4 W.N. 127 ; and *McDonald v. Gagan*, (1884) 5 N.S.W.R. 78 ; and R. 183 (*supra*).

187. Whenever the defendant obtains judgment of *non pros.* for any cause, he may have his costs taxed at any time, and issue execution for the same. Execution on judgment of *non pros.*
12 April, 1856,
R. 46.

And see ss. 261, 262, C.L.P. Act, *ante*.

188. Every application to stay execution, or for speedy execution, under the Common Law Procedure Act, 1899, shall be by summons, notice of motion or rule *nisi* only, unless made immediately after the verdict to the presiding Judge. Stay of execution, and speedy execution.
19 August, 1861,
R. 2.

An order staying proceedings obtained *ex parte* was set aside : *A.J.S. Bank v. Proudfoot*, (1885) 2 W.N. 24 ; see *Brown v. Citizens' Life Assurance Co.*, (1903) 20 W.N. 6.

See s. 134, C.L.P. Act, and notes, *ante*.

The Court has no jurisdiction to stay proceedings after final judgment has been signed after verdict : *Woodin v. Australian Newspaper Co.*, (1896) 13 W.N. 63 ; *Martin v. Fletcher*, (1898) 14 W.N. 158. But where the Privy Council had given leave to appeal, see *Howarth v. Walker*, (1903) 20 W.N.

189. When the Judge has reserved, or given leave to move the Court on any point, execution shall be stayed without any such application. On points or leave reserved.
Ibid. R. 3.

190. No writ of execution shall be issued till the judgment paper, postea, or writ of inquisition, as the case may be, has been seen by the proper officer, nor shall any execution be issued without a *præcipe* being filed. Issue of writ
H.T., 1863,
R. 71.

191. Every writ of execution shall bear date on the day on which the same is issued, and shall be tested in the name of the Chief Justice for the time being, or in case of a vacancy of such office, then Date, teste, and return of writ.
Ibid. R. 72.
6 March, 1886,
R. 11.

RULES in the name of the senior Puisne Judge, and may be made returnable immediately after the execution thereof.

But though not in the name of the Chief Justice this may be amended : *Nicholls v. Rosenfeld*, (1886) 7 N.S.W.R. 322.

Address of party
or Solicitor to be
indorsed on writ.
H.T., 1853,
R. 73.

192. Every writ of execution shall be indorsed with the name and registered office of the Solicitor actually suing out the same ; and when such Solicitor sues out the same as agent for a Solicitor in the country, the name and registered office of such Solicitor in the country shall also be indorsed upon the said writ. If no Solicitor is employed to issue the writ, then it shall be indorsed with a memorandum expressing that the same has been sued out by the plaintiff or defendant in person, as the case may be, mentioning the city, town, or parish, and also the name of the hamlet, street, and number of the house of such plaintiff or defendant's residence, if any such there be.

Indorsement of
direction to
Sheriff.
Ibid. R. 76.

193. Every writ of execution shall be indorsed with a direction to the Sheriff, or other officer or person to whom the writ is directed, to levy the money really due and payable and sought to be recovered under the judgment, stating the amount, and also to levy interest thereon, if sought to be recovered, at the rate of four pounds per centum per annum, from the time when the judgment was entered up : Provided that in cases where there is an agreement between the parties that more than four per centum interest shall be secured by the judgment, then the indorsement may be accordingly to levy the amount of interest so agreed.

The writ should follow the judgment in the amount for which it issues ; the indorsement showing the amount to be really levied. But a writ of execution issued for a less amount than the judgment is not necessarily bad : *Nicholls v. Rosenfeld*, (1886) 7 N.S.W.R. 322 ; *Clarke v. Maybury*, (1898) 14 W.N. 116 ; *McDonald v. Gagan*, (1884) 5 N.S.W.R. 78.

As to interest see s. 143 C.L.P. Act, and the Interest on Judgments Amending Act, 1900 (*ante*).

Sheriff to levy
according to
indorsement.
Restitution.
6 March, 1856,
R. 13.

194. The Sheriff shall in all cases levy in accordance with such indorsement. If a larger sum be indorsed than is due either for debt or interest or costs, restitution may be summarily awarded by a Judge.

Interest.
H. T., 1853,
R. 77.

195. In cases of an assessment of further damages, pursuant to the statute of 8 and 9 Will. III, c. 11, it shall be stated in the body of the writ of execution that the Sheriff or person to whom the writ is directed, is to levy interest on the damages assessed, and costs taxed in that behalf, at the rate of four pounds per centum per annum from the day on which execution was awarded.

See C.L.P. Act, s. 132 (*ante*).

Execution on
recognizances
or fines.
6 March, 1856,
R. 17.

196. Every writ of execution for the King on any estreated recognizance, or to levy any fine, shall be against the person in the first instance, on the Sheriff's failure to find sufficient property, as well as against the party's lands, moneys, and goods.

Personal estate
to be first sold.
Ibid. R. 21.

197 The Sheriff, unless (a) the debtor otherwise desires, or (b) in his opinion it would be inadvisable to sell the personal estate first, shall first sell the personal estate of a debtor, and then if the proceeds thereof are not sufficient to satisfy the execution, he shall sell the real estate.

And see Judgment Creditors Remedies Act, 1901 (*ante*).

198. Where the debtor alleges that his lands are more than sufficient to satisfy the execution, he may point out to the Sheriff what part or parts he will have first sold, and the same shall be sold accordingly; but if the same be not sufficient to satisfy such execution, then the Sheriff shall proceed to sell the whole of the lands, or such other parts thereof as are sufficient to satisfy the claim, including all costs.

**RULES
198-207.**

Execution debtor may elect lands to be first sold.
6 March, 1856.
R. 22.

See Judgment Creditors Remedies Act, 1901 (*ante*).

199. The like privilege shall belong to the debtor in respect of his personal estate taken, subject to the same condition as in the last Rule.

The like as to chattels.
Ibid. R. 23.

200. All property of every description taken in execution shall be put up for sale as early as may be with a due regard to the interests of all parties: Provided that if the Sheriff cannot effect an early sale of any property without a sacrifice of its reasonable value, he may delay the sale, and by application to a Judge obtain an order for enlarging, if necessary, the time for returning the writ.

Early sale.
Ibid. R. 24

201. The Sheriff shall, before he makes sale of any property, diligently inform himself whether it would be best, with the view of obtaining the highest prices for the same, to cause the sale to be at the place of levy or elsewhere; and he shall sell at the place where, in his judgment, such prices are most likely to be obtained.

Place of sale.
Ibid. R. 25.

202. Where any property is to be put up for sale, the Sheriff shall cause notice of the time and place and particulars thereof to be given in such manner as appears to him best calculated to give due publicity to such sale.

Notice of sale.
Ibid. R. 26.

See Judgment Creditors Remedies Act, 1901 (*ante*).

203. The Sheriff shall pay to the person entitled thereto or his solicitor the surplus, if any, arising from any levy as soon as practicable after the expiration of seven days from the receipt thereof.

Surplus to be paid to person entitled thereto.
Ibid. R. 32.

As to the Sheriff's duty in case of bankruptcy proceedings being taken against the debtor, see Bankruptcy Act, 1898, s. 54.

204. The costs of all steps after judgment rendered necessary by any Rule of this Court may be allowed by the Prothonotary as costs incident to the issue of the writ.

Costs of necessary steps after judgment.
Ibid. R. 13.

205. A writ of *capias ad satisfaciendum* to fix bail shall have eight days between the *teste* and return, and must be entered four clear days before the return thereof in the public book at the Sheriff's Office.

Time for return H. T., 1855, R. 75.

See Judgment Creditors Remedies Act, 1901 (*ante*).

206. A rule or order for the discharge of a prisoner who has been detained in execution a year for a sum under twenty pounds may be made absolute in the first instance on an affidavit of notice given ten days before the intended application, which notice may be given before the year expires.

Discharge of prisoner after twelve months where amount under £20.
Ibid. R. 129.

See Judgment Creditors Remedies Act, 1901 (*ante*).

" Scire Facias " and Revivor.

207. Every writ of *scire facias* may be made returnable at any time, and a copy may be served upon the defendant without summons; and such service, on proof thereof, shall amount to a *scire feci*; and in

Writ of *sci. fa.* 6 March, 1856, R. 10.

**RULES
207-214.**

case the defendant cannot be found, a Judge may order notice of such writ to be inserted in the *Gazette* and one other newspaper, requiring him to appear at a certain day and show cause according to the exigency of such writ; and if the defendant fails to appear according to such notice, such default shall be sufficient to found a judgment.

See C.L.P. Act, s. 148 (*ante*).

Quashing *sci. fa.*
or revivor.
H. T., 1853,
R. 78.

208. A plaintiff shall not be allowed a rule to quash his own writ of *scire facias* or revivor after a defendant has appeared, except on payment of costs.

See C.L.P. Act, s. 147 (*ante*).

Auditâ Querelâ.

Rule or order
necessary.
Ibid. R. 79.

209. No writ of *auditâ querelâ* shall be allowed, unless by rule of Court, or order of a Judge.

See C.L.P. Act, s. 96 (*ante*).

Privy Council Appeals.

Applications
may be heard
by two Judges.
10 Sept., 1858.

210. All applications for leave to appeal, or for the allowance of an appeal to His Majesty in Council from any judgment, decree, or order of the Court in any jurisdiction, and all matters in relation thereto, respectively, may be heard and disposed of on any day on which two Judges sit as in Banco for any other purpose, in or out of Term.

See Orders in Council, title "Privy Council," *ante*, as to these Rules.

Security to be
fixed.
19 Feb., 1892.

211. Upon every such application the Court will determine in the first instance whether the case is one in which it has power to allow such appeal; and if it be determined that the case is one in which such appeal should be allowed, the Court will proceed to fix the security which is to be given by the appellant for the due prosecution of the appeal and for the payment of costs.

Preparation and
settlement of
transcript,
Ibid.

212. As part of such security for due prosecution, the Court, before allowing the appeal, will require the appellant to lodge, within a time to be in each case fixed, a sum of money with the Prothonotary to cover the costs of the preparation of the transcript, and will further require the appellant to take out all such appointments for the purpose of settling the transcript as may be necessary.

Appeal to be
allowed on
compliance with
requirements.
Ibid.

213. If within three months from the date of filing the petition for leave to appeal the appellant produces to the Court, or in vacation to a Judge, a certificate under the hand of the Prothonotary that due security has been given, and that all the requirements of the last preceding Rule have been complied with, then, and not otherwise, the Court will allow the appeal.

Appellant to
lodge copy of
record.
13 Sept., 1888.

214. In every case of appeal to His Majesty in Council the appellant shall, within three months from the day on which judgment on such appeal has been given or pronounced by the Judicial Committee of his Majesty's Privy Council, deliver or cause to be sent to the Prothonotary a printed copy of the transcript record in the cause, together with printed copies of the cases of the appellant and respondent respectively.

Arrest, Bail, &c.

RULES

215-223.

215. Affidavits to found an arrest may be sworn before the commencement of the action. Provided that in such a case they shall not be intitled in any action.

Affidavits before action.
10 May, 1886,
R. 8.

As to arrest on *ca. re.*, see Arrest on Mesne Process Act, 1902 (*ante*).

Affidavit.—See that Act, s. 5 (*ante*).

216. Every order to arrest shall be intitled in the action ; and if the writ of summons has not then been issued, the order will be set aside with costs.

Order not to be made before action.
Ibid. R. 9.

217. Before any writ of *capias* shall be issued in Sydney, a præcipe for the same shall be filed. Every such præcipe and writ shall be in the Form No. 4 and No. 5 respectively contained in the first Schedule.

Præcipe and writ.
Ibid. R. 1.

The form of præcipe must be strictly followed and the residence of defendant stated ; also a time for return of the writ : *Holloway v. Routledge*, (1862) 1 S.C.R. 15 ; or the bail bond will be ordered to be cancelled.

A writ was set aside, the præcipe being undated and the name of the Judge who made the order not appearing : *Coppin v. Rogers*, (1887) 3 W.N. 107.

The writ according to Form 5 (*post*), must state the residence in correspondence with the præcipe ; but this may be amended: *Bank of New Zealand v. Billyard*, (1885) 1 W.N. 104 ; *Campbell v. Gunn*, (1896) 12 W.N. 114.

As to defendant's name, see R. 229 (*post*).

A copy of the writ should be given to defendant. Where the copy was substantially correct and the name of the attorney appeared on it (though not apparently on the original writ), *Stephen, J.*, refused to set aside the writ on that ground : *Young v. Halfnights*, (1887) 4 W.N. 61.

Where the attorney's name was not endorsed on the writ, this was amended : *Bank of New Zealand v. Billyard*, (*supra*).

218. Where the order for arrest is made on circuit, the præcipe shall be delivered to the associate, by whom the same shall be forthwith transmitted, with the affidavits on which such order was made, to the Prothonotary.

Where order made on Circuit.
Ibid. R. 2.

219. In all such last-mentioned cases, the defendant shall be entitled to a copy of every such affidavit, to be delivered by the plaintiff gratis within twenty-four hours after demand.

Defendant entitled to copy of affidavits.
Ibid. R. 3.

220. Any number of defendants may be arrested in the same action under one order ; but no more than one defendant, unless a Judge otherwise directs, shall be included in one *capias*.

Several defendants.
Ibid. R. 7.

221. Any number of writs may be issued for the arrest of any defendant within the time limited by the order ; and upon a return of *non est inventus* as to any defendant, *alias* writs may be, in like manner, issued within the like time after such return, if the order has in terms reserved that power.

Several writs and alias writs.
Ibid. R. 10.

222. The officer making any arrest shall, within twenty-four hours afterwards, indorse on the *capias* or *alias* writ or warrant the true date of such arrest.

Indorsement of date of arrest.
Ibid. R. 11.

223. Every writ of *capias* shall be returned, where the defendant cannot be found, at the expiration of thirty days after the date thereof ; or where the writ is for execution above 200 miles from Sydney, at the expiration of sixty days after the date thereof.

Return of writ if not executed.
Ibid. R. 4.

The time for the return of the writ must appear in the præcipe : *Holloway v. Routledge*, (1862) 1 S.C.R. 15.

RULES**224-232.**

Return after
execution.
10 May, 1886,
R. 5.

Service of
summons.
Ibid. R. 6.

224. Where the writ is executed it shall be returned within eight days after the arrest ; but if executed above 100 and not above 200 miles from Sydney, within twelve days ; and if executed above 200 miles from Sydney, within sixteen days after the arrest.

225. Any defendant arrested, if not previously served with a copy of the writ of summons, may be served therewith upon his arrest, or within forty-eight hours afterwards, notwithstanding that he may then be in custody.

As to the copy summons, see *Young v. Halfnights*, 4 W.N. 61 (*ante*) note to R. 248.

Service of
declaration.
Ibid. R. 32.

226. Where any defendant arrested upon mesne process is in custody thereon at the time of filing the declaration, the plaintiff shall, on the day the declaration is filed, lodge a copy thereof at the office of the Sheriff, who shall forthwith cause the same to be transmitted to the defendant, and the lodging of such copy shall be deemed good service upon the defendant.

Neglect to serve
declaration.
Ibid. RR. 33-4.

227. If the plaintiff fails to leave such copy as required by the preceding Rule, the defendant may be discharged out of custody as to such action, by order of a Judge.

But where plaintiff not having left a copy of the declaration in accordance with R. 226, defendant appeared and then applied by summons to set aside the *ca. re.*, it was held that he had waived the irregularity by appearing : *Cooper v. Holdsworth*, (1884) 1 W.N. 83.

The Bail-bond.

Bail-bond.
Ibid. R. 12.

228. The bond to the Sheriff on the arrest shall be from one surety or from two sureties jointly and severally in twice the amount mentioned in the writ, where not exceeding fifty pounds ; but where the arrest is for a larger sum, the bond shall be limited to that sum and an added sum (to cover costs) of fifty pounds.

Misnomer.
H.T., 1863,
R. 82.

229. Where the defendant is described in the writ of *capias* or affidavit to hold to bail by initials, or by a wrong name, or without a Christian name, the defendant shall not be discharged out of custody, or the bail-bond delivered up to be cancelled on motion for that purpose, if it appears to the Court or Judge that due diligence has been used to obtain knowledge of the proper name.

In *Thompson v. Bartlett* (1886) 2 W.N. 105, *Windreyer, J.*, refused to set aside a writ, the defendant's name being Barclay ; and where a wrong initial was given, ordered the writ to be amended : *Proudfoot v. Drake*, (1882) T.T.R. 107.

Signing
judgment on
bail-bond.
Ibid. R. 84.

230. In all cases where the bail-bond is directed to stand as a security, the plaintiff may sign judgment upon it.

Stay of proceed-
ings on payment
of costs.
Ibid. R. 85.

231. Proceedings on the bail-bond may be stayed on payment of costs in one action, unless sufficient reason be shown for proceeding in more.

Pending rule to
bring in body.
Ibid. R. 87.

232. A plaintiff shall not be at liberty to proceed on the bail-bond pending a rule to bring in the body of the defendant.

Where the defendant had failed to put in special bail and had sequestered his estate, and the plaintiff had taken an assignment of the bond and was suing one of the bondsmen on it, and the defendant was within the jurisdiction and could be rendered on motion by the bondsman, proceedings in the action on the bond were ordered to be stayed on payment of the taxed costs of the action, and costs of the summons by the bondsman : *Campbell v. Gunn*, (1896) 13 W.N. 24.

233. No rule shall be drawn up for setting aside an attachment regularly obtained against a Sheriff for not bringing in the body, or for staying proceedings regularly commenced on the assignment of any bail-bond, unless the application for such rule, if made on the part of the original defendant, is grounded on an affidavit of merits, or if made, on the part of the Sheriff or bail, or any officer of the Sheriff, is grounded on an affidavit showing that such application is really and truly made on the part of the Sheriff, or bail, or officer of the Sheriff, as the case may be, at his or their own expense, and for his or their indemnity only, and without collusion with the original defendant.

RULES **233-242.**

Application to set aside attachment or stay proceedings.
H.T. 1853,
R. 88.

234. Whenever a plaintiff rules the Sheriff on a return of *cepi corpus* to bring in the body, the defendant shall be at liberty to put in and perfect bail at any time before the expiration of such rule; and a plaintiff having so ruled, the Sheriff shall not proceed on any assignment of the bail-bond until the time has expired to bring in the body as aforesaid.

Defendant may put in bail pending rule to bring in body.
Ibid. R. 89.

235. If a rule for returning a writ of *capias* expires in vacation, and the Sheriff or other officer having the return of such writ returns *cepi corpus* thereon, a rule may thereupon issue requiring the Sheriff or other officer, within the like number of days after the service of such rule as by the practice of the Court is prescribed with respect to rules to bring in the body issued in Term, to bring the defendant into Court by forthwith putting in and perfecting bail above to the action; and if the Sheriff or other officer does not duly obey such rule, an attachment shall issue in the following Term for disobedience of such rule, whether the bail has or has not been put in and perfected in the meantime.

Rule to bring defendant into Court in vacation.
Ibid. R. 90.

Special Bail.

236. The time specified in the writ for putting in bail to the action shall in all cases be eight days after the arrest; but where the arrest is 100 and not above 200 miles from Sydney the defendant shall have twelve days; or if above 200 miles, then sixteen days after such arrest.

Time for putting in bail.
10 May, 1856,
R. 14.

237. More bail than two shall not be allowed in any case, except by order of a Judge.

Number of bail.
Ibid. R. 22.

238. Every recognizance of bail, on being entered into, shall be signed by the bail.

Recognizances to be signed.
Ibid. R. 16.

239. The amount of such recognizance shall be from each bail jointly and severally the amount mentioned in the *capias*, with fifty pounds to cover costs added.

Amount of recognizance.
Ibid. R. 17.

Where the affidavit stated that the damages were £150 at the least, *Owen, J.*, ordered bail in £200 and refused to set aside the writ on the ground being taken that bail was for too much: *Pearl v. Daldorf*, (1902) 19 W.N. 1.

240. Bail shall only be liable to the amount mentioned in the *capias* and the costs of suit, not exceeding in the whole the amount of their recognizance.

Liability of bail.
H.T., 1853,
R. 109.

241. In the case of country bail, the bail-piece shall be transmitted and filed within eight days.

Country bail.
Ibid. R. 95.

242. A defendant having put in special bail shall cause notice thereof, with the names and additions of the bail, to be forthwith served on the plaintiff.

Notice of bail.
10 May, 1856,
R. 19.

RULES**243-253.**

Contents of
notice.
H.T., 1853,
R. 97.

Change of bail.
Ibid. R. 92.

Persons
disqualified to
act as bail.
Ibid. R. 94.

Bail to Sheriff
becoming bail to
action.
Ibid. R. 86.

Exception to
bail.
10 May, 1854,
R. 19.

Justification
of bail.
Ibid. R. 20.

Costs of notices
of justification.
H.T., 1853,
R. 111.

Justification of
bail when put in.
10 May, 1854,
R. 21.

Amount of
justification.
Ibid. R. 17.

Bail indemnified
for justification.
H.T., 1853,
R. 93.

Exception after
affidavit of
justification:
Costs where bail
allowed.
10 May, 1854,
R. 23.

243. Every such notice shall, in addition to the descriptions of the bail, mention the street or place and number (if any) where each of the bail resides, and all the streets or places and numbers (if any) in which each of them has been resident at any time within the last six months, and whether he is a housekeeper or a freeholder.

244. The bail, of whom such notice is given, shall not be changed without leave of the Court or a Judge.

245. If any person put in as bail to the action, except for the purpose of rendering only, is a practising Solicitor, or Clerk to a practising Solicitor, or a Sheriff's Officer, Bailiff, or person concerned in the execution of process, the plaintiff may treat the bail as a nullity, and sue upon the bail-bond as soon as the time for putting in bail has expired, unless good bail be duly put in in the meantime.

246. When bail to the Sheriff become bail to the action, the plaintiff may except to them, though he has taken an assignment of the bail-bond.

247. If the plaintiff desires to except to the bail, he shall enter his exception, and serve notice thereof on the defendant within four days next following the service of notice of bail.

248. Within four days (excluding Sunday) after service of notice, the defendant shall justify such bail (or added bail if necessary) before a Judge in Chambers, the Prothonotary, or a Commissioner for taking bail. Two days' notice (excluding Sunday) of such justification shall be given to the plaintiff.

249. Whenever two or more notices of justification of bail have been given before the notice on which bail shall appear to justify, no bail shall be permitted to justify without first paying (or securing to the satisfaction of the plaintiff, his Solicitor, or agent) the reasonable costs incurred by such prior notices, although the names of the persons intended to justify, or any of them, have not been changed, and whether the bail mentioned in any such prior notice have not appeared or have been rejected.

250. The bail may justify when put in, if the defendant thinks fit, on two days' notice (excluding Sunday) for that purpose: Provided that if the plaintiff desires a postponement for any time not exceeding three days, and gives the defendant one day's notice to that effect, specifying the time, the time shall be postponed accordingly.

251. No bail shall be required to justify in a larger amount than the amount mentioned in the *capias*, with fifty pounds added; or where the arrest is for more than one hundred pounds the amount mentioned in the *capias* with one hundred pounds added.

252. No person shall be permitted to justify himself as good and sufficient bail for any defendant if such person has been indemnified for so doing by the Solicitor concerned for any such defendant.

253. Where the notice of bail is accompanied by an affidavit of justification from each of the bail in the Form No. 6 contained in the First Schedule, if the plaintiff afterwards excepts to either of them and such bail are allowed, he shall pay the costs of justification.

254. In like manner, if the bail, or either of them, be rejected, the defendant shall pay the costs of opposition, unless a Judge otherwise orders. **RULES 254-263.**

The like where bail rejected.
10 May, 1856, R. 24.
Where no notice of exception given.
H.T., 1853, R. 99.

255. If the plaintiff does not give one day's notice of exception to the bail by whom such affidavit has been made, the recognizance of such bail may be filed without other justification than such affidavit.

Further time.
10 May, 1856, R. 18, 20.

256. Further time, either for putting in or excepting to or justifying bail, may be given by a Judge, either *ex parte* or after a summons to show cause.

Deposit in lieu of bail.

257. Any defendant arrested on mesne process may, in lieu of putting in special bail, pay into Court the amount mentioned in the *capias*, with fifty pounds to cover costs added. **Payment into Court in lieu of special bail.**

258. No money deposited with the Sheriff or paid into Court at any time in lieu of bail, shall be returned or paid out without a Judge's order by consent, or after a summons to show cause. **Deposit in lieu of bail not to be returned without order.**
Ibid. R. 13.

See notes to s. 9 of the Arrest on Mesne Process Act, *ante*.

Where money had been paid in in lieu of special bail and plaintiff had a verdict, an order for payment out was made under this Rule on summons, but without costs : *Woods v. Dunning*, (1885) 2 W.N. 27.

259. Where money has been paid into Court in lieu of bail, the defendant, if he pleads payment into Court, may transfer such money, or part thereof, to the credit of the plea. **Plea of payment into court.**
Ibid., R. 25.

Render in discharge of Bail.

260. Any defendant holden to bail may be rendered in discharge of such bail to the nearest prison upon a Judge's order for that purpose being lodged with the Sheriff. Such order shall state whether the application is made on behalf of the principal or the bail, the stage of the proceedings, and for what amount the defendant was holden to bail. **Defendant may be rendered in discharge.**
Ibid. RR. 27, 28.

Action on a bail bond was stayed without rendering the defendant, he having sequestrated his estate : *Campbell v. Gunn*, (1896) 13 W.N. 24.

261. A copy of such order, with notice of the defendant's being in custody thereon, signed by the defendant or his bail, shall, within four days after such render (or within such time as a Judge may allow), be served on the plaintiff, upon which the bail shall be exonerated without entering any *exoneretur*. **Exoneration of bail.**
Ibid. R. 28.

262. Where the defendant is in custody at the suit of another plaintiff, the bail may (upon the Sheriff's certificate of the fact) apply to the Judge for a *committitur* in the cause in which they are bail ; and upon a certificate from the gaoler, properly verified, that he has the defendant in custody on such *committitur*, the bail may be discharged by a Judge's order : Provided that they shall pay all costs which may have been incurred upon any proceedings previously commenced against them. **Where defendant already in custody.**
Ibid. R. 28.

263. Bail, though rejected, shall be allowed to render the principal without entering into a fresh recognizance. **Render by rejected bail.**
H.T., 1853, R. 104.

RULES**264–270.**

Time for render.
H.T., 1853.
R. 105.

Render where
plaintiff
proceeds on
recognizance.
Ibid. R. 108.

264. Bail shall be at liberty to render the principal at any time during the last day for rendering, provided they make such render before the prison doors are closed for the night.

265. Where the plaintiff proceeds by action on the recognizance of bail, the bail shall be at liberty to render their principal at any time within the space of eight days next after the service of the process upon them, but not at any later period; and upon notice thereof being given, the proceedings shall be stayed upon payment of the costs of the writ and service thereof only.

Stay of
proceedings.
Ibid. R. 110.

266. To entitle bail to a stay of proceedings pending an appeal, the application must be made before the time to surrender is out.

Discharge from Custody.

Discharge of
defendant in
default of
prosecution.
10 May, 1856.
R.R. 29–31.

267. In either of the following cases, the defendant being in custody may be discharged from such custody by order of a Judge, that is to say:—

- (a) In an action to recover a debt or liquidated demand, if the defendant has not pleaded, unless the plaintiff proceeds to judgment and execution within thirty days after the time limited for pleading;
- (b) In any other action, or where the defendant has pleaded, unless the plaintiff proceeds to trial during the ensuing Sittings;
- (c) In any action, unless the plaintiff proceeds to final judgment and execution within twenty days after verdict.

Extension of
time.
Ibid. R. 34.

268. Provided that a Judge may in any case, on application made to him for such order, allow further time to the plaintiff, on such terms as to costs and otherwise as he thinks reasonable.

Costs.

Costs on arrest.
Ibid. R. 35.

269. No more than eight pounds eight shillings shall be allowed for costs on an arrest (excluding the Sheriff's and Bailiff's fees thereon, but including the summons) without leave of a Judge: Provided that where the arrest is for a sum not exceeding fifty pounds, such costs shall be six pounds six shillings only.

Attachment.

Rules absolute
in first instances.
H.T., 1853,
R. 168.

270. Rules for attachment shall be absolute in the first instance in the two following cases only, viz.:— firstly, for non-payment of costs on the taxing officer's allocatur; secondly, against the Sheriff for not obeying a rule to return a writ or to bring in the body.

But in case of disobedience of a writ of *habeas corpus* the Court thought they had power to issue a writ absolute in the first instance, though under the particular circumstances of the case they refused to do so: *In re Emery*, (1888) 5 W.N. 24.

A rule for attachment of an attorney for non-payment of money under a Judge's order should be *nisi* only in the first instance: *Ex parte Dooley*, (1866) 5 S.C.R. 343.

An attachment for costs absolute in the first instance was granted: *Merritt v. Smith*, (1871) 10 S.C.R. 230.

Foreign Attachment.**RULES
271-279.**

271. Every writ of foreign attachment under Part XX of the Common Law Procedure Act, 1899, shall be returnable on some Chamber day.

Writs returnable
on Chamber day.
10 May, 1856,
R. 26.

See ss. 188 *et seq.*, C.L.P. Act, *ante*.

272. Every such writ, and the notice to garnishees thereon, and to the defendant, and the bond to be entered into under the writ, shall be in the Form Nos. 7, 8, 9 and 10 respectively, contained in the First Schedule.

Forma.
Ibid.

Absent Defendant.

273. The notice to an absent defendant, under the 32nd and 33rd sections of the said Act, shall be in the Form No. 11 contained in the First Schedule.

Notice to
absent
defendant.
Ibid. R. 27.

Ejectment.

274. No judgment in ejectment for want of appearance or defence, whether limited or otherwise, shall be signed without first filing an affidavit of the service of the writ according to the Common Law Procedure Act, 1899, together with a copy of such writ, or, where personal service has not been effected, without first obtaining a rule or order, authorising the signing such judgment, which said rule or order, or a duplicate thereof, shall be filed, together with a copy of the writ.

Judgment by
default.
H.T., 185.
R. 112.

As to judgment for want of appearance in ejectment, see s. 219 C.L.P. Act, *ante*.
As to service of writ, see s. 212.

275. Where a person not named in the writ in ejectment has obtained leave of the Court or a Judge to appear and defend, he shall enter an appearance according to the Common Law Procedure Act, 1899, intituled in the action against the party or parties named in the writ as defendant or defendants, and shall forthwith give notice of such appearance to the plaintiff's Solicitor, or to the plaintiff if he sues in person.

Appearance by
person not
named in writ.
Ibid., R. 113.

See C.L.P. Act, s. 214 (*ante*).

276. If a plaintiff in ejectment is nonsuited at the trial the defendant shall be entitled to judgment for his costs of suit.

Costs on nonsuit.
T.T., 1852, R. 29.

See C.L.P. Act, s. 225 (*ante*).

Cases from Inferior Courts.

277. If a cause be removed from an inferior Court having jurisdiction of the cause, the costs in the Court below shall be costs in the cause.

Costs in like
cases.
H.T., 1853,
R. 117.

Mining Appeals.

278. Every appeal to the Court under the 115th section of the Mining Act, 1874, shall be by notice in the form No. 12 contained in the First Schedule, or to the like effect, and shall be directed to the opposite party or his Solicitor, and to the District Court Judge whose decision is appealed from.

Notice of appeal.
18 Nov., 1874,
R. 1.

279. One copy of such notice shall be served on the District Court Judge and one on the opposite party or his solicitor.

Service.
Ibid.

RULES 280-290.

Special case to
be stated.
18 Nov., 1874,
R. 1.

Entry for
argument.
Ibid.

280. The District Court Judge shall thereupon sign a statement of the case with the written assent of both parties or their Solicitors, or, if they will not agree, without such assent.

281. On such statement, together with a copy of the notice of appeal and an affidavit of the service thereof, being filed in the Prothonotary's office, the appeal shall be set down for argument.

Arbitration.

Procedure.
24 March, 1893,
R. 1.

282. Where any cause or matter, or any question or issue of fact arising therein, is, under the provisions of section 15 of the Arbitration Act, 1902, referred to an Arbitrator or Referee, he may, subject to the order of the Court or a Judge, hold the trial at or adjourn it to any place he may deem most convenient, and have any inspection or view which he may deem expedient for the better disposal of the controversy before him. He shall, where practicable, proceed with the trial *de die in diem*.

See the Arbitration Act, 1902 (*ante*).

Notice of
hearing.
Ibid. R. 2.

283. Before proceeding with the hearing, the Arbitrator or Referee shall give to the parties not less than one week's notice of the time and place thereof, and may, on the application of either party, extend the time for hearing if he sees fit.

Non-appearance
of either party.
Ibid., R. 3.

284. In the event of either of the parties not appearing after service of the notice required by these Rules, the Arbitrator or Referee may proceed *ex parte*.

Proceedings
upon hearing.
Ibid., R. 4.

285. The Arbitrator or Referee shall have power to administer oaths to, or take the affirmations of, the parties and witnesses appearing; and every such hearing shall be conducted in the same manner, as nearly as circumstances will admit, as trials are conducted before a Judge and Jury.

Powers of
Arbitrator or
Referee.
Ibid., R. 5.

286. The Arbitrator or Referee shall have power to direct a nonsuit of the plaintiff, to find a general verdict, or to determine such issues, or answer such questions as the Court or a Judge may direct.

Case for opinion.
Ibid., R. 6.

287. The Arbitrator or Referee may state a case for the opinion of the Court or a Judge upon any point of law arising out of any facts found by him upon the hearing of the reference.

Deposit of fees.
Ibid., R. 7.

288. Upon the appointment of the Arbitrator or Referee, the Court or a Judge may order the parties or either of them to pay into Court, within a specified time, such sum of money as the Court or Judge deems sufficient, as a deposit for the remuneration of such Arbitrator or Referee.

Time for report
or award.
Ibid., R. 8.

289. The Arbitrator or Referee shall make his report or award within the time named by the order of reference, or within such extended time as the Court or a Judge may direct.

Report or award
to be transmitted
to Prothonotary.
Ibid., R. 9.

290. The Arbitrator or Referee shall, within one week of making his report or award, transmit the same under sealed envelope to the Prothonotary, and shall at the same time send notice thereof to the parties.

This Rule was held directory only : *Petersen v. Lane*, (1895) 11 W.N. 186.

291. The Arbitrator or Referee shall, when so transmitting his report or award, also send under separate cover to the Prothonotary a statement showing exactly the time occupied and the amount expended by him in connection with the hearing of the matter so referred.

**RULES
291-300.**

Statement of
time occupied
and expenditure
24 March 1893,
R. 10.

292. The Prothonotary shall forthwith bring the said statement before the Court or a Judge, and so soon as the Court or a Judge has determined the amount of remuneration to be paid to the Arbitrator or Referee, the Prothonotary shall inform the parties thereof.

Remuneration
of Arbitrator or
Referee.
Ibid., R. 11.

293. Upon payment by the parties, or either of them, of any amount that may be determined by the Court or a Judge as payable to the Arbitrator or Referee, in excess of the sum deposited under Rule 288, the envelope containing the report or award shall be opened by the Prothonotary, who shall give notice thereof to the parties.

Publication of
report or award
Ibid., R. 12.

294. After receipt of the notice in the last Rule mentioned, either party may move the Court or a Judge to direct that a verdict may be entered in accordance with the finding of the Arbitrator or Referee, or that such order may be made as to the Court or a Judge may seem fit.

Entry of
verdict, &c.
Ibid., R. 13.

But where a consent order had been made referring the matter and at the same time ordering that the award should be entered as a verdict, no further order was necessary : *Petrie v. Swift*, (1892) 8 W.N. 92.

The order may be made as a consent order ; and consent should be applied for, otherwise the applicant may have to pay costs : *Beard v. Baines*, (1898) 15 W.N. 29.

295. If either party be dissatisfied with the report or award of the Arbitrator or Referee, he may, within fourteen days from service of the notice mentioned in Rule 293, move the Court or a Judge for a rule *nisi*, or order to show cause why the report or award should not be set aside, referred back, or amended ; and the grounds upon which the rule *nisi* is asked for shall be set forth in an affidavit upon which the motion is made.

Rule *Nisi* to set
aside award, &c
Ibid., R. 14.

See Arbitration Act, 1902, s. 16 (*ante*).

But a new trial may be moved for : *O'Donoghue v. Oliphant*, (1903) 20 W.N. 19.

296. Whenever the practice is not provided for by these Rules, then the practice of the Court in its Common Law Jurisdiction shall be followed so far as applicable.

Practice where
Rules silent.
Ibid. R. 16.

297. Costs may be taxed on an award, notwithstanding the time for setting aside the award has not elapsed.

Costs on award.
H.T., 1853,
R. 170.

Rules, Notices, Summonses, and Orders.

298. Every rule of Court shall be dated the day of the week, month, and year on which the same is made, without reference to any other time or date.

Date of rules.
Ibid., R. 149.

299. Every rule or order issued by the Prothonotary shall be signed by him, and be under the appropriate office seal.

Signature of
rules and orders.
Mar., 1856, R. 3.

300. A rule may be enlarged, if the Court think fit, without notice.

Enlargement of
rules.
H.T., 1853, R. 151

RULES **301-307.**

Certain orders
not to be granted
ex parte.
28 Feb., 1886,
R. 20.

301. No order for time to file any pleading or particulars, or do any other act, extending beyond two clear days, shall be granted *ex parte*.

Such an order made *ex parte*, must be made before the time originally fixed for the doing of the act expires, otherwise the order is a nullity : *Petersen v. Rodgers*, (1897) 13 W.N. 180.

As to the time given by a two day order, see *Gwyn v. Anthony*, (1882) T.T.R. 123, and *Johns v. Sydney Leather Co.*, (1892) 8 W.N. 100 ; and see as to computation of time generally, R.R. 309-402 (*post*).

Getting a two day order like any other step waives an irregularity in the pleadings : *Carroll v. Forrester*, 11 S.C.R. 72.

Ex parte order
may be rescinded
or varied
ibid., R. 21.

302. Where any order granting such leave or time has been made *ex parte* the same may on cause shown be rescinded or varied by the imposition of terms or otherwise by any Judge.

Where in an action on a promissory note the two day order gave defendant the whole vacation to plead and this fact was not stated to the Judge who made the order, *Innes, J.*, set aside the order and gave defendant seven days to plead : *Aiken v. Sevenoaks*, (1884) 1 W.N. 2.

Issue of
Chamber
summons.
ibid., R. 11.

303. Every summons for the attendance of any party before a Judge shall be signed by the Chief Clerk, and may be obtained at any time returnable on the next convenient Chamber-day : Provided that any summons may be signed by a Judge, returnable at any time.

— Objection was taken that a summons issued on Monday, returnable on Friday, was signed by the chief clerk ; *held*, that next Chamber day meant next convenient Chamber day, allowing time for service, *e.g.*, in country cases ; and in any event the respondent had waived the objection by appearing and filing affidavits : *In re Jhonson*, (1890) 6 W.N. 126.

Certain summonses must be signed by a Judge, as a summons to set aside a *ca. re.* : *Cowlshaw v. Cummins*, (1884) 1 W.N. 21. And it is said that any summons to set aside a Judge's order should be signed by a Judge : *Guligelmini v. Cunningham*, (1890) 7 W.N. 4. But a summons to strike out a plea as embarrassing need not be signed by a Judge although a Judge's order to plead several matters has been obtained *ex parte* : *Proudfoot v. Commissioners for Railways*, (1893) 10 W.N. 80.

Summonses to
be numbered.
6 Oct., 1889,
R. 1.

304. Every summons returnable in Chambers shall be numbered in the order in which it is filed, and the same number shall be marked on the entry of the summons in the Chamber-book.

Absence of Chief
Clerk.
28 Feb., 1886,
R. 15.

305. In the Chief Clerk's absence his duties under these Rules may be discharged by the Prothonotary or by the Clerk next in seniority.

Grounds to be
stated in
summons.
ibid., R. 16.

306. Every summons shall state shortly the grounds of the application or the points intended to be relied on, and where an amendment is required the nature of such amendment ; or if an irregularity is complained of, the particular irregularity shall be specified.

Exception.
ibid., R. 17.

307. Provided that where the grounds or points necessarily appear on the face of the summons, or are stated in some affidavit or affidavits thereby referred to as containing them (of which affidavit or affidavits in such case a copy shall be served with the summons), no further specification shall be necessary.

On a motion for trial of issues of law before issues of fact, *Windeyer, J.*, held that it was necessarily implied that it was expedient that the issues of law should be tried first, and heard the summons, although no grounds were stated in summons or affidavit : *Clune v. Watson*, (1882) T.T.R. 75, and see R. 308, note, *infra*.

Where the irregularities complained of were in the affidavit accompanying a plea to a declaration on a cheque it was held that they should have been set out in the summons : *Savage v. Sinclair*, (1898) 14 W.N. 114 ; see *Clarke v. Darley*, 14 W.N. 129.

RULES 307-310.

In *Brown v. Proctor*, (1901) 18 W.N. 93, the summons was to set aside a judgment "upon the grounds appearing in and by the affidavits"; the point was taken that the grounds were not stated in the summons (although the affidavits seem to have been served), *Stephen, J.*, dismissed the summons on the point taken; *sed quare*; the decision (as reported) seems to overlook the second of the above Rules, R. 307; but followed in *Gaden v. Harvey*, 20 W.N. 39, where the irregularity was not expressly specified either in summons or affidavit; and this is probably the ground of the decision in *Brown v. Proctor*, that the irregularity must be specifically stated and not left to be spelled out from the affidavits. See *Brooks & Co. v. Smith*, W.N. 64.

In *Short v. White*, (1893) 9 W.N. 105, a summons was dismissed without costs on the point taken that no grounds appeared in the summons, and no reference to an affidavit.

The summons may be amended : *Schneider v. Scherf*, (1902) 19 W.N. 60.

308. The last two Rules shall be equally in force with respect to notices of motion and rules *nisi*. Provided that the Court may in granting any such rule dispense with the service or give further time for the service of the affidavits.

The like as to notices of motion and rules *nisi*.
28 Feb., 1858,
R. 18.

Where a rule *nisi* stated no grounds and did not refer to any affidavit containing the grounds, and no affidavit was served, the Court discharged the rule : *Ex parte Kearns*, (1877) Knox 13.

But where the grounds sufficiently appeared on the face of the rule *nisi*, the Court refused to give effect to a preliminary objection that the grounds were not stated : *Buckstone v. Bennett*, (1877) Knox 481.

309. No application to set aside process or proceedings for irregularity shall be allowed unless made within a reasonable time, nor if the party applying has taken a fresh step after knowledge of the irregularity.

Setting aside proceedings for irregularity.
H.T., 1853,
R. 185.

The general rule is that an irregularity may be waived; see *e.g.*, *Howard v. Neeld*, (1900) 17 W.N. 64, where judgment had been signed too soon, but the irregularity was held to be waived by the appearance of the attorney on taxation of costs : *Butler v. Creigan*, (1892) 9 W.N. 57, where an objection that a summons had not been served in time was held to have been waived by filing and serving an affidavit : *Thompson v. Hood*, (1884) 5 N.S.W.R. 202, where an order making an order *nisi* for a prohibition a rule of Court had not been served, held waived by filing an affidavit : *In re Jhonson*, (1890) 6 W.N. 126 ; *Baird v. Ah Hung*, (1898) 15 W.N. 126 ; *R. v. Solomon*, (1868) 8 S.C.R. 30 (the last two cases being on attachment) ; *Carroll v. Forrester*, 11 S.C.R. 72, waiver of irregularities in pleas by taking a two day order.

The application must be made within a reasonable time; delay is a waiver : *McDonald v. Gagan*, (1884) 5 N.S.W.R. 78.

Where a notice of trial was irregular and defendant moved twenty-three days after trial to set notice of trial and all proceedings aside, held too late : *Small v. Madgwick*, (1898) 1 S.C.R.N.S. 251. Delay of a year held a waiver : *North v. Shierlaw*, (1897) 13 W.N. 163.

Obtaining adjournments and filing affidavits held no waiver : *Brown v. Proctor* (1901) 18 W.N. 93 ; but such cases as *Thompson v. Hood* and *Butler v. Creigan* (*supra*) were not cited.

310. Every summons returnable in Chambers shall be served on the party whose attendance is required before one o'clock of the afternoon preceding the return day, or if returnable on Monday before one o'clock of the preceding Friday afternoon, unless a Judge otherwise orders.

Service of summons.
23 Aug., 1865.
11 Dec., 1901,
R. 29.

**RULES
810-818.**

Where a summons returnable on Monday was not served before five o'clock on Friday, in accordance with the then Rule the irregularity was held waived by filing and serving affidavits: *Butler v. Creigan*, (1892) 9 W.N. 57.

Where a summons was returnable on Monday the 9th September, but had been served too late on the previous Friday, the application was dismissed with costs although owing to the pressure of business in Chambers the matter was not heard until the 20th September: *Mahoney v. Bennett*, (1901) 18 W.N. 185.

Summons for *de bene esse* examination.
28 Feb., 1856
R. 22.

311. Upon any application for a commission, rule, or order under the 4th section of the Witnesses Examination Act, 1900, the rule or summons to show cause may be served at any time before five o'clock of the preceding afternoon, and no ground need be stated therein otherwise than by reference to the affidavit or affidavits filed, of which no copy need be served.

See that Act, *ante*.

Carriage of rule or order.
Ibid., R. 8.

312. In all cases the party moving the Court or applying to a Judge shall have the carriage of the rule or order, whether in his favour or not: Provided that where the same is not taken out and served within two days next following, it may be taken out and served by his adversary.

As to the course a party should follow who desires to appeal against a Judge's order, see notes to Supreme Court and Circuit Courts Act, 1900 (*ante*).

Costs on disobedience.
Ibid., R. 9.

313. Where a Judge's order is made a rule of Court such rule shall be drawn up with costs, to be paid by the party against whom it is made, if an affidavit be filed that the order was served on such party or his Solicitor and has been disobeyed.

Confirmation of orders.
25 Oct., 1899.
11 Dec., 1901,
R. 2.

314. Notice must be given to the Prothonotary, on or before the Saturday preceding the commencement of each term, of all intended applications for confirmation by the Court of orders made under and by virtue of the twentieth section of the Act, 1900, No. 35.

1900, No. 35.—The Supreme Court and Circuit Courts Act, 1900 (*ante*); see that Act s. 20 as to the practice on such applications.

When rule to be a stay of proceedings.
H.T., 1855,
R. 140.

315. Rules to show cause shall be no stay of proceedings unless two days' notice of the motion has been served on the opposite party, except in the cases of rules *nisi* for new trial, or to set aside an award or annuity deed, or to enter a suggestion, or by the special direction of the Court.

Motions and Chamber Business.

Matters to be entered in Term-book.
1 Dec., 1857.
R. 6.
11 Dec., 1901,
RR. 20, 22.

316. The Prothonotary shall keep a book to be called the Term-book, in which shall be entered every rule *nisi* for a new trial as soon as granted, and every other matter for argument in Term, according to its priority in the date of filing.

Term-paper.
1 Dec., 1857,
R. 7.

317. The Term-paper shall be made out from time to time from the said book, and copies printed and exhibited in the Court-rooms and in the hall.

Order of business.
Ibid., R. 5.
11 Dec., 1901,
RR. 20, 22, 24.

318. Subject to any rules regulating the precedence of business, every matter shall come on for hearing in the order in which it is entered in the Term-book.

See the Rules regulating the precedence of business in the Almanac for the year.

319. Provided that any criminal case or other urgent matter may by order of the Court or a Judge be advanced, either generally, or to be heard on a particular day.

**RULES
319-324.**

Urgent matters may be advanced.
1 Dec., 1887, R. 8
Notice of motion.

320. In all cases where notice of motion is necessary, two days' notice shall be given unless a Judge otherwise orders.

As to computation of time see RR. 399-402 (*post*).

321. Where a motion is made in pursuance of any notice, no affidavit shall be used in support thereof without leave of the Court, unless a copy of the same or notice of its having been filed has been served before one o'clock in the afternoon of the day preceding the return day of such notice.

Service of affidavits in support.
28 Feb., 1886, R. 6.

See s. 255, C.L.P. Act, *ante*; and R. 391 (*post*).

In *Wolfe v. Blick*, (1865) 4 S.C.R. 62, an objection that affidavits had not been filed before one o'clock of the day preceding the motion was upheld.

This Rule does not apply to motions for new trials: *Jones v. Gorman*, (1862) 3 S.C.R. 32.

322. For the purposes of any motion or application in Chambers the parties may (on production by the proper officer) use any of the pleadings or any order made or writ issued or præcipe or particulars filed in the cause without further or other proof. But no affidavit shall be used (unless made for the purposes of such motion or application) without notice of the party's intention so to do, such notice to be served before the day on which the motion or application is heard.

Use of papers filed in the cause.
Ibid., R. 7.

See R. 391 (*post*) as to use of affidavits.

This Rule was said not to apply where there was an appeal against a Judge's order; the order must then be annexed to an affidavit: *Herbert v. Municipal District of Manly*, (1900) 21 N.S.W.R. 373; 17 W.N. 197; *Zaccour v. Basha*, (1899) 20 N.S.W.R. 431; 16 W.N. 107.

323. All affidavits in opposition to any motion to make a rule absolute, including a rule *nisi* for a new trial, shall, unless the Court or a Judge allows further time, be filed before one o'clock of the day preceding the day upon which the motion is heard.

Filing affidavits in opposition.
5 July, 1888.

See s. 255, C.L.P. Act, *ante*, and R. 391 (*post*).

The old Rule was held to mean that affidavits in opposition should be filed before one o'clock of the day preceding the *return day of the rule*; the Court refused to allow affidavits filed later to be read: *Ex parte Tewkesbury*, (1898) 19 N.S.W.R. 440; 15 W.N. 137; but allowed it when the affidavits were filed at three o'clock on the day before the return day and the matter did not come on to be heard for two months: *Ex parte Lucas*, (1899) 16 W.N. 51; refused it again in *Ex parte Sherlock*, (1899) 16 W.N. 94; *Ex parte Loue*, (1901) 18 W.N. 153; *Ex parte Goldsmith*, (1902) 2 S.R. 433; 19 W.N. 278; allowed it *Hirschman v. Blashki*, (1902) 19 W.N. 231.

Leave to file affidavits after the return day was granted although the application for leave was not made till after the return day: *Mott v. Clarke*, (1900) 16 W.N. 208.

Affidavits filed on the morning of the day a rule came on were allowed to be read: *Jones v. Gorman*, (1864) 3 S.C.R. 32; but the only Rule referred to (according to the report) was the Rule corresponding to R. 321 (*ante*).

On a motion to make absolute a rule *nisi* moved on affidavits only the affidavits used on the motion for the Rule can be read in support: *R. v. Smith*, 6 S.C.R. 259.

324. On any application for a prohibition, unless the moving party intends to apply for an order directing the costs of the application to be paid by the magistrates, it shall not be necessary to serve copies of the affidavits in support of the rule or order upon the magistrates.

Service upon Magistrates on applications for prohibition
26 Oct., 1897.

RULES
325-334.

Service upon
O.P.S. sufficient.
26 Oct., 1897.

Counsel on
appeal from
inferior Courts.
26 Oct., 1888.

325. In all cases, service of a rule, order, or affidavit upon the Clerk of Petty Sessions of the Court wherein the adjudication took place, shall be deemed to be service upon the magistrates.

326. No more than one Counsel on either side shall be heard on any appeal to the Court from inferior Courts.

But where a junior had commenced the argument in his leader's absence, the senior counsel coming into Court was allowed to continue in a District Court appeal: *Murdoch v. Durning*, (1893) 14 N.S.W.R. 303; 9 W.N. 168.

Only one counsel is heard on a special case stated under the Justices Act: *Potter v. Ridsdale*, (1892) 13 N.S.W.R. 248.

327. No more than one Counsel shall be heard on any motion for a rule *nisi* for a new trial.

But a junior counsel may read the Judge's notes: *Galway v. Brennan*, (1902) 19 W.N. 191.

On motion for
rule *nisi*.
19 Aug., 1861,
R. 8.

On motion for
rule absolute.
Ibid., R. 10.

328. No more than two Counsel on either side shall be heard on any motion to make absolute a rule *nisi* for new trial: Provided that nothing in this or the last two preceding rules, shall affect any practice as to the allowance of Counsel on the taxation of costs.

Counsel for a respondent is allowed to comment on cases cited for the first time in reply: *Fraser v. Evans*, 6 S.C.R. 378; *York v. Nicholson*, 7 S.C.R. 102.

Where senior counsel had been stopped in chief and the other side called upon, the junior was not allowed to follow his senior in reply: *Jones v. Mason*, (1892) 13 N.S.W.R. 157; 8 W.N. 142.

On demurrers only one counsel is heard; the junior is not as a rule allowed to read the pleadings: *Ricketson v. Cook*, (1899) 20 N.S.W.R. 298; 16 W.N. 28.

A senior cannot follow his junior in argument: *Harris v. Perpetual Trustee Co.*, (1893) 14 N.S.W.R. 133.

Counsel's
addresses.
28 Feb., 1856,
R. 10.
29 April, 1856,
R. 18.
11 Dec., 1901,
R. 20.

Rule absolute in
the first instance
28 Feb., 1856,
R. 4.

Costs where
motion
unsuccessful or
abandoned.
Ibid., R. 8.

Chamber
business.
Ibid., R. 13.

Minutes of
Chamber
business.
1 Dec., 1857, R. 1.

Chamber-list.
6 Oct., 1859, R. 2.

329. In prohibition matters under the Justices Act, 1902, and on motions to make any rule absolute, the moving party shall begin and the party showing cause follow, and one Counsel only shall be heard in reply. And before the opening, any affidavits in support of the rule shall be read, unless the Court otherwise orders.

330. Where notice has been given of any motion, the Court may, if it thinks fit, grant a rule absolute in the first instance, unless application is then made and sufficient ground shown for delay.

331. Where notice has been given of any motion, if the Court refuses the same, or if the party who gave the notice fails to appear, the costs of opposition or of attendance by any party to oppose shall be in the discretion of the Court: Provided that the Court may, in its discretion, allow the motion to stand for some future day.

332. All Chamber business will be transacted by one of the clerks in the Prothonotary's office, who shall attend the Judge in Chambers, and shall indorse upon the papers a note of the order made.

333. A book shall be kept by such clerk, which may be searched at all reasonable times, in which shall be minuted the nature of every application in Chambers, the names of the Counsel or Solicitors appearing, and the order made.

334. On every Chamber day a list of all summonses for hearing on that day, in the order in which they appear in the Chamber-book, shall be exhibited in the Public Chamber or other room appointed for that purpose, specifying in each case the names of the parties and the names of the Solicitors applying.

335. Every case shall be called on and heard according to its order in such list, without reference to priority on any other ground. Provided that any matter may be postponed or adjourned if the Judge sees fit.

**RULES
335-347.**

Order of business.
6 Oct., 1859, R. 3.

336. No Chamber application will be entertained on any day in or out of term, except in cases of emergency, after one o'clock.

Applications after 1 o'clock.
11 Dec., 1901, R. 30.

337. When an application in Chambers is referred to the Court, it shall be entered in the Term-book for the next motion day, and be heard as a rule nisi.

Applications referred to the Court.
13 Nov., 1858.

Criminal and Crown Matters.

338. Every criminal information granted by the Court (under the statute 9 Geo. 4, c. 83, s. 6, or otherwise) shall be in the name of the Attorney-General, but with the following words at the foot thereof—
“By leave of the Supreme Court.”

Criminal informations.
29 April, 1856, R. 19.

339. Every such information so granted shall be signed by the prosecutor's Counsel or Solicitor, and be indorsed with the words “On the prosecution of,” adding the prosecutor's name and the name of his Solicitor.

Signature and indorsement.
Ibid., R. 20.

340. The process on every such information, after security for costs given, shall be a summons under the hand of a Judge commanding the party to appear thereto on a certain day, and on failure to appear after personal service (to be proved by affidavit), a *capias* or a Bench warrant.

Form of process.
Ibid., R. 21.

341. Every such information may be filed and such summons be made returnable at any time, in or out of Term: Provided that the case shall be tried, unless the Court or a Judge shall otherwise order, at the next Gaol Delivery at Darlinghurst (or Circuit Court, if to be tried at a Circuit town) which shall happen after the leave given to file such information.

Time for proceeding.
Ibid., R. 22.

342. After appearance, the defendant shall plead or demur within four days, unless a Judge grants further time, and the like proceedings shall thereupon be had up to the trial as nearly as may be as in an action.

Proceedings before trial.
Ibid., R. 23.

343. The day of trial shall be the first Friday of the Sittings, unless the Court or a Judge otherwise appoints.

Day of trial.
Ibid., R. 24.

344. If the prosecutor fails to give notice of trial or to bring the case to trial on the day appointed, the Court may, on motion for that purpose, award costs to the defendant.

Costs on default of prosecution.
Ibid., R. 25.

345. Every information exhibited at any criminal session in Sydney or on Circuit shall bear date on the day of filing, and shall be numbered on the back in the order in which the same was filed.

Date of information.
Ibid., R. 27.

346. In all Crown matters, where no other course is prescribed by any Rule of the Court, the practice in force on the 29th April, 1856, in the Court of Exchequer in civil cases, and in the Court of Queen's Bench on the Crown side thereof in criminal cases, shall be in force and observed in the Court.

Practice in Crown matters.
Ibid., R. 29.

347. Provided that in prosecutions commenced in any Circuit Court or at Darlinghurst, the course of practice in all things not by these Rules otherwise provided for shall be that which on the said date

Practice in criminal matters.
Ibid., R. 30.

RULES obtained at the Assizes generally, or in the Central Criminal Court in
347-354. England.

Minutes of
 proceedings.
 29 April, 1856,
 R. 27.

348. The Associates shall keep a minute-book for each Circuit Court, and for the Sydney Criminal Sittings, severally, in which shall be noted the proceedings at each trial, with every fine imposed, recognizances estreated or entered into, and order of the Court made during the Sittings.

Procedure on
 Crown cases
 reserved.
 17 March, 1893

349. On the hearing of any special case stating a question of law reserved on a criminal trial, the party on whose behalf it was reserved shall begin and shall have the right of reply.

Fines and Recognizances.

Schedule of
 fines and
 recognizances.
 6 March, 1856,
 R. 27.

350. Within eight days after the last day of each Sitting for Causes in Sydney, and of every Session of Goal Delivery and Sitting of any Circuit Court, a schedule of all fines imposed and recognizances forfeited thereat shall be made out by the Clerk of the Court sitting at the time of such impositions and forfeitures respectively.

Contents and
 verification of
 schedule.
Ibid., R. 28.

351. Every such schedule shall contain the name, residence, and trade, profession, or calling of every party named therein, and the amount or sum forfeited by each respectively, with the cause of forfeiture; and shall be signed by the clerk making out the same, and be verified by his affidavit before a Judge that the schedule has been by such clerk carefully made up and examined, and that all fines and recognizances imposed and forfeited at the Sittings there mentioned are, to the best of his knowledge and understanding, therein truly inserted.

Summonses.
Ibid., R. 29.

352. Every such schedule shall, within ten days after the Sittings, be lodged with the Prothonotary, who shall thereupon issue out of his office and deliver to the Sheriff as many summonses as there are names therein against which any fine or forfeiture is set, which summonses shall be in the form now in use, and shall be made returnable either on the first or the last day of the then present or next ensuing Term.

Service of
 summonses.
Ibid., R. 30.

353. The Sheriff shall, without delay, cause every such summons to be served upon every person therein named, by leaving a copy thereof with him, or at his dwelling with some member of his household there, six days at the least (or where the party resides fifty miles or more from Sydney, ten days at the least) before the return day of the summons; and he shall return every such summons into Court, according to the exigency thereof, with a statement of the mode in which it has been served, and an account of all sums received by him under the same.

Execution to
 issue unless
 cause shown.
Ibid., R. 31.

354. On the first or last day of Term (as the case may be), every schedule then undisposed of shall be brought into Court by the Prothonotary, and the names of the parties against whom any such fine or forfeiture is set, and of which the amount has not been paid, shall be called, and unless sufficient cause be then shown why the unpaid fines and forfeitures should not be levied, the Court shall direct the Prothonotary to issue and deliver to the Sheriff writs of execution against the parties in default respectively for levying the amount of the same.

355. Every sum levied under any such writ by the Sheriff, or his officers, shall be paid over by him to the Colonial Treasurer, and be accounted for in the manner appointed by law. **RULES 355–364.**

Disposal of sums levied.
6 March, 1856,
R. 32.

Penal and “Qui Tam” Actions.

356. Leave to compound a penal action shall not be given in cases where part of the penalty goes to the Crown, unless notice has been given to the proper officer, but in other cases it may.

Leave to compound penal actions.
H.T., 1853,
R. 118.

357. The rule for compounding any *qui tam* action shall express therein that the defendant thereby undertakes to pay the sum for which the Court has given him leave to compound such action.

Form of rule.
Ibid., R. 119.

358. When leave is given by the Court to compound a penal action, the King's part of the composition shall be paid into the hands of the Sheriff for the use of His Majesty.

Payment of composition.
Ibid., R. 120.

Guardian and Next Friend.

359. A special admission of *prochein amy* or guardian to prosecute or defend for an infant shall not be deemed an authority to prosecute or defend in any but the particular action or actions specified.

Authority confined to particular action.
Ibid., R. 5.

See as to next friend and guardian, p. 28 (*ante*.)

Paupers.

360. No person shall be permitted to sue *in forma pauperis*, unless the case laid before Counsel for his opinion, and his opinion thereon, with an affidavit of the party or his Solicitor that the said case contains a full and true statement of all the material facts to the best of his knowledge and belief, are produced before the Court or Judge to whom application is made, and no fees shall be payable by a pauper to his Counsel or Solicitor, or at the offices of the Prothonotary or Associates, or at the Judge's Chambers, or elsewhere, by reason of a verdict being found for such pauper exceeding five pounds.

Suits *in forma pauperis*.
Ibid., R. 131.

361. A person admitted to sue *in forma pauperis* shall not in any case be entitled to costs from the opposite party, unless by order of the Court or a Judge.

Suitor *in forma pauperis* not entitled to costs
T.T., 1853, R. 28.

See as to costs allowed a person suing *in forma pauperis*: *Carson v. Pickersgill*, 14 Q.B.D. 859; *Johnson v. Lindsay*, (1892) A.C. 110.

362. Where a pauper omits to proceed to trial pursuant to notice, he may be called upon by a rule to show cause why he should not pay costs, though he has not been dispaupered, and why all further proceedings should not be stayed until such costs are paid.

Costs on omission to proceed to trial.
H.T., 1853,
R. 122.

Petitions.

363. Every petition shall be dated, and signed by the Petitioner or his Counsel or Solicitor.

Date and signature.
1 March, 1856,
R. 6.

Writs Generally.

364. The Sheriff shall in all cases carry every writ into execution, according to the nature thereof, with the least practicable delay, notwithstanding that the same may not be immediately returnable.

Duty of Sheriff.
Ibid., R. 25.

RULES 365-373.

Disposal of
moneys.
1 March, 1856,
R. 5.

365. Where the Sheriff has received any moneys under any writ, he shall, after deducting all lawful charges, pay the balance to the Solicitor of the Creditor, or, with the consent of such Solicitor, to the person entitled thereto or his Solicitor, as soon as practicable

(a) after the expiration of seven days from the receipt of such moneys, where they are the proceeds of a sale under any writ ;
or

(b) after the receipt thereof in other cases :

Provided that he shall not have received any notice to retain the same from some person claiming to be interested therein.

See the Bankruptcy Act, 1898, s. 54.

Notice to return
writ or bring in
body.
6 March, 1856,
R. 14.

366. In all cases where the Sheriff is served with notice to return any writ, or to bring in the body of any defendant, he shall return such writ, or bring in such defendant, within four days after receipt of such notice.

Rule expiring in
vacation.
H.T., 1853,
R. 131.

367. When a rule to return a writ expires in Vacation, the Sheriff shall file the writ at the expiration of the rule, or as soon after as the office is open, and the officer with whom it is filed shall endorse the day and hour when it was filed.

Issue of rules in
vacation.
Ibid., R. 132.

368. No Judge's order shall issue for the return of any writ or to bring in the body of a defendant, but a side-bar rule shall issue for that purpose in Vacation as in Term, which shall be of the same force and effect as side-bar rules made for that purpose in Term.

Attachment for
disobedience.
Ibid., R. 133.

369. If a rule issues in Vacation for the return of any writ of *capias*, *ca. sa.*, *fi. fa.*, *elegit*, *habere facias possessionem*, *venditioni exponas*, or other writ of execution, and such rule has been duly served, but obedience has not been paid thereto, an attachment shall issue for disobedience of such rule, whether the thing required by such rule has or has not been done in the meantime.

Sheriff going
out of office.
Ibid., R. 134.

370. Where any Sheriff, before going out of office, arrests any defendant, and takes a bail-bond and makes return of *cepi corpus*, he may within the time allowed by law be called upon to bring in the body by a rule for that purpose, notwithstanding he may be out of office before such rule is granted.

Expenses of
execution, and
proceeds of sale
6 Mar., 1856,
R. 15.

371. All expenses attending the execution of process by the Sheriff may be taxed and assessed by the Prothonotary, if a Judge, on summons to show cause, thinks fit so to order ; and an order may in like manner be obtained by any party interested for the rendering of an account by the Sheriff of such expenses and of the proceeds of any sale or sales by him.

See *Gardiner v. Orr*, (1894) 15 N.S.W.R.115 ; 10 W.N. 193.

Service at a
distance.
Ibid., R. 16.

372. No Sheriff's officer shall be compellable to go more than forty miles from his own residence for the service of any process, nor shall more than one hundred miles of mileage be allowed in any case without the order of a Judge.

Execution of
process at a
distance.
Ibid., R. 18.

373. No greater expense shall be chargeable against any party respecting whom or whose property the execution of process is made for the extra cost of executing the same at a distance from Sydney than the cost of transmitting the same by the least expensive mode to and

from the place of residence of the nearest Sheriff's officer, and mileage according to the mode of execution and distance of the place where the same is made from the place of residence of such officer; and no mileage shall be allowed to any such officer unless he states in his return to the Sheriff the number of miles the party lives from his residence.

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374. The Sheriff shall not be required to act upon any conditional order for suspending the execution of any process, but only upon an absolute order in writing to that effect, which order may be at any time withdrawn by the same party lodging with the Sheriff written instructions to execute the said process.

Orders to suspend execution.
6 Mar., 1886,
R. 20.

Papers Generally.

375. All notices required by any Rule, or by the practice of the Court, shall be in writing.

Notices to be in writing.
H T., 1883,
R. 161.

376. All pleadings and matters in writing between parties filed or delivered by any Solicitor in any cause or proceeding shall be written in a clear and distinctly legible hand, on foolscap paper, having a quarter margin; and no pleading or paper shall be filed or received by any officer of the Court unless so written. Provided that Judgment Rolls shall be on parchment.

Pleadings, &c., how to be written.
1 Mar., 1886,
R. 12.

377. All pleadings, special cases, and affidavits, filed by any Solicitor, or intended by him to be used in any cause or proceeding, shall be written on one side of the paper only and folded lengthwise.

The same.
Ibid., R. 13.

378. All papers and documents filed and intended to be used in Chambers shall be legibly indorsed "In Chambers."

Papers to be indorsed "In Chambers."
10 Mar., 1887.

Where affidavits were not endorsed in accordance with this Rule leave was given to amend but "not to be a precedent": *Service v. Flatau*, (1900) 16 W.N. 248; and "no amendment will in future be allowed": *Ex parte Lysaght*, (1901) 18 W.N. 27.

See R. 388 and notes, *post*.

379. Every memorandum or notice required by any rule of the Court in any jurisdiction to be subjoined to any form may be indorsed thereon, and where required to be indorsed the same may be subjoined.

"Subjoining" and "indorsing."
1 Mar., 1886,
R. 7.

380. All documents of which printed copies are by any rule required to be filed shall be printed upon cream-wove white foolscap folio paper in pica type, leaded, with an inner margin an inch wide, and an outer margin two inches and a half wide.

Form of printed documents.
21 May, 1888,
R. 4,
19 Dec., 1889,
R. 3.

Affidavits in all Jurisdictions.

The following note of English cases and practice taken from Day's Common Law Procedure Act. may be found useful; references to cases in the N.S.W. Courts have been added.

Their Title.

An affidavit should be entitled in the Court in which the action is brought: *Molling v. Poland*, 3 M. & S. 157. See *Jones v. Jones*, (1898) 19 N.S.W.R. 43; 14 W.N. 207. But this may be amended: *Ex parte Pollard*, (1863) 2 S.C.R. 192. As to affidavits for an order for *ca. re.* see R. 246 (*ante*). The affidavit should also be entitled in the cause: *Ball v. Stanley*, 6 M. & W. 396; in which case it ought to state the Christian names and surnames of all the parties to the action, otherwise it cannot be used: *Anderson v. Baker*, 3 Dowl. 107; *Cohen v. Williams*, 8 Dowl. 418. Thus an affidavit entitled *A. v. B. and others*, would be bad: *Doe d. Pryme v. Roe*, 8 Dowl. 340. The Christian name and surname should be stated at length: *Masters v. Carter*, 4 Dowl. 577. In actions upon bills of exchange, promissory notes, or other written instruments, any of the parties to which are designated

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by the initial letter or letters, or some contraction, of the *Christian* or first name or names, it is sufficient to designate such person in an affidavit by the same initial letter or letters, or contraction, of the *Christian* or first name or names, instead of stating the *Christian* or first name or names, in full : 3 & 4 Will. 4, c. 42, s. 12 ; see C.L.P. Act, s. 65 (*ante*) ; the affidavit should show such initials to have been so used : *Holbert v. Williams*, 8 Dowl. 139. Where the defendant is described by initials, by a *wrong name*, or *without a Christian name*, it should appear that due diligence has been used to obtain knowledge of the proper name ; but as a general rule it is sufficient if the identity of the parties clearly appears : *Baldwin v. Bannerman*, 12 C.B. 152. It should also clearly appear which parties are plaintiffs and which defendants : *Harris v. Griffith*, 4 Dowl. 289. Entitling a cause as "C.D. ats. A.B." instead of A.B. v. C.D. has been held bad : *Richards v. Isaac*, 2 Dowl. 710. If defective in either of these respects, the affidavit may be rejected.

If the plaintiff sue, or the defendant is sued, in a representative capacity, as executor, administrator, or assignee, his *representative character* must be stated : *Wright v. Hunt*, 1 Dowl. 457 ; and the party of whom the plaintiff or defendant is executor, administrator or trustee in bankruptcy must be stated ; "assignee, &c.," for instance, having been held insufficient : *Casley v. Smith*, 4 Dowl. 477.

By whom to be made.

The true abode and the addition of the deponent, or of all the deponents, if several, should be stated in the affidavit : *Cobbett v. Oldfield*, 16 M. & W. 469 ; R.G., H.T. 1853, r. 138. See R. 381 (*infra*). It is, however, sufficient in affidavits sworn by a party to the cause to describe the deponent as "the above-named plaintiff (or defendant)," without inserting the place of abode, or any other addition : *Shire v. Walker*, 2 M. & G. 917. The breach of the rule is however an irregularity only, which may be waived : *Ex parte King*, L.R. 7 C.P. 74.

It is sufficient if the deponent describe himself as "of the city of London, merchant" : *Vassier v. Alderson*, 3 M. & S. 165 ; or as "of Bath, in the county of Somerset, esquire" : *Coppin v. Potter*, 2 Dowl. 785 ; and see *Hewer v. Cox*, 30 L.J.Q.B. 73 ; *Briggs v. Boss*, L.R. 3 Q.B. 268, for decisions under the Bills of Sale Act. See also *Thorp v. Browne*, L.R. 2 H.L. 220 ; which case is explained in *Jones v. Harris*, L.R. 7 Q.B. 157.

Where a foreigner who had come to this country merely for temporary purposes, described himself as of his place of residence abroad, it was deemed sufficient : *Boutchet v. Kittoe*, 3 East, 154.

It is sufficient if the clerk to an attorney state the place of business of such attorney as his residence : *Strike v. Blanchard*, 5 Dowl. 216 ; *Attenborough v. Thompson*, 2 H. & N. 559. Where a deponent described himself as "S., clerk to E.J., esq., barrister-at law, and assessor of the Court of Passage of the Borough of L.," the affidavit was rejected : *Winch v. Williams*, 12 C.B. 416.

A clerk may describe himself as of the office where he does business during the day, although he sleep elsewhere : *Haslop v. Thorne*, 1 M. & S. 103.

A person lately discharged from prison, but who slept there, was held sufficiently described as late of that prison : *Sedley v. White*, 11 East, 528. The residence stated must be the *true* one ; therefore a deponent cannot describe himself as *late* of a place where he has ceased to reside, when he actually resides elsewhere at the time : *ibid.* 529, *per Lord Ellenborough*, C.J.

An affidavit must state the rank or degree in life, profession or trade of the deponent, unless he is a party in the cause. This addition ought to be stated with sufficient certainty. "Merchant" : *Vassier v. Alderson*, *supra* ; "manufacturer," "late clerk to," &c., "managing clerk to," &c. : *Simpson v. Drummond*, 2 Dowl. 473 ; "agent of the plaintiff" : *Luxford v. Groombridge*, 2 Dowl. N.S. 332 ; have been held to be sufficient additions ; but see *Winch v. Williams*, *supra*. An affidavit by "R.J., late of the city of W., victualler, but now of," &c., without further addition, has been held sufficient : *Angel v. Ihler*, 5 M. & W. 163. But "assessor" is not sufficient : *Nathan v. Cohen*, 3 Dowl. 370. And the descriptions "acting as managing clerk," &c. : *Graves v. Browning*, 6 Ad. & E. 805 ; or "articled clerk" : *R. v. Reeve*, 4 Q.B. 211 ; are insufficient if it be not stated to *whom* or in *what* profession. Under the Bills of Sale Act, it has been held that the lessee and manager of a theatre should not be described as an "esquire" : *Ex parte Hooman*, L.R. 10 Eq. 63 ; nor an attorney's clerk as a "gentleman" : *Tuton v. Sanover*, 3 H. & N. 280 ; 27 L.J. Ex. 293 ; *Beales v. Tennant*, 29 L.J.Q.B. 188 ; *Brodrick v. Scale*, L.R. 6 C.P. 98 ; and as to the propriety of the addition "gentleman" to other persons than attorneys, see Chit. Stat., 3rd ed. vol. i., p. 417, notes, and vol. iv., p. 1066 ; see also *Briggs v. Boss*, L.R. 3 Q.B. 268.

It is not necessary to give any addition to any party mentioned in the affidavit, except to the deponent : *Wallis v. Foyce*, 1 D. & R. 150.

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The Contents.

Affidavits must be divided into paragraphs, and each paragraph must be numbered consecutively, and must be confined as near as may be to a distinct portion of the subject : R.G., M.V. 1854, r. 2. See R. 382 (*infra*).

The statements made in an affidavit should be such that perjury may be assigned on them if they are false ; they should, therefore, be distinctly expressed. Everything that is material should be stated, as the defendant may have no opportunity to deny the truth of the statement, and nothing should be left to intendment : *Frick v. Poole*, 9 B. & C. 543 ; but at the same time no irrelevant matter should be introduced. Statements as to the existence of a cause of action must be direct and positive, and not argumentative : *Pomp v. Ludvigson*, 2 Burr. 655. Swearing to a debt, "as deponent believes" : *Rios v. Belisant*, 2 Str. 1209 ; or, "as appears by the bond" : *Heathcote v. Goslin*, 2 Str. 1157 ; or, "by the agreement" : *Jennings v. Martin*, 3 Burr. 1447 ; or, "according to the bill delivered to the defendant" : *Williams v. Jackson*, 3 T.R. 575 ; or even swearing that defendant is indebted in a sum "for which he has not accounted" : *Champion v. Gilbert*, 4 Burr. 2126 ; would not be sufficient. An affidavit of debt for goods sold and delivered, which went on to state that the creditor had received no other security save certain bills of exchange, overdue and unpaid, was by Lord *Tenterden*, at chambers, held insufficient, as it did not allege that the creditor was the holder. An affidavit, however, that the defendant is indebted in such a sum "as the plaintiff computes it," would be good : *Moaltby v. Richardson*, 2 Burr. 1032.

When facts are not within the deponent's knowledge, he should allege that he has been informed thereof, and that he verily believes them to be true. Thus, where it is from the circumstances clearly impossible to swear positively (as where the cause of action arose from non-payment of bills in India), it is considered sufficient to state that the bills were not paid "to deponent's knowledge and belief" : *Hobson v. Campbell*, 1 H. Bl. 245 ; and see *Roe v. Bradshaw*, *infra*. See observations as to swearing "on information and belief" in *Arndt v. Porter*, 30 L.J. Ex. 19. The source of the information must be stated : *Seward v. Quigley*, (1901) 18 W.N. 35 (a case in Equity where there is an express Rule dealing with the matter.) An affidavit "to the best of the belief" of the deponent, was held sufficient under the Bills of Sale Act : *Roe v. Bradshaw*, L.R. 1 Ex. 106.

Clerical errors are not considered sufficient ground for rejecting an affidavit when the meaning is clear. But this will depend upon whether the mistake is material or not. In a case where a party sued by his next friend, and the affidavit stated the suit to be by her next friend, the affidavit was upheld. An affidavit, however, in which the word oath was omitted : *Oliver v. Price*, 3 Dowl 261 ; and another in which the word "said" was substituted for "saith" : *Howarth v. Hubbersty*, 3 Dowl. 455 ; were held insufficient ; so an affidavit where the words "make oath and say" were omitted, was rejected : *Allen v. Taylor*, L.R. 10 Eq. 52.

Before whom Affidavits to be used in the Superior Courts may be sworn.

Affidavits to be used in the Superior Courts may be sworn before the court or the judge to whom the application is made. An affidavit sworn before a judge of one of the Superior Courts may be used in England in the court to which such judge belongs, but not in any other court unless entitled in such other court : R.G., H.T. 1853, r. 144. They may also be sworn before a commissioner empowered to take affidavits in the court in which the affidavit is entitled : 29 Car. 2, c. 5, s. 2. See as to affidavits sworn before attorneys, their agents and clerks : R.G., H.T. 1853, rr. 142, 143 ; and *Horsfall v. Mattheuman*, 3 M. & S. 154. See R.R. 389,390 (*post*).

Affidavits, if sworn in Scotland or Ireland, may be sworn before a commissioner of the court appointed to take affidavits : 3 & 4 Will. 4, c. 42, s. 42. An affidavit may also be sworn either before a judge or magistrate, or other person authorised by law to take affidavits. If the affidavit be sworn before a judge, the judge's signature to the jurat must be verified by affidavit to be made in this country (England) : *Dalmer v. Bernard*, 7 T.R. 252. If sworn before a magistrate or other person, not only the signature, but also the authority to administer an oath, must be verified in like manner or by the certificate of a notary public : *Ex parte Worsley*, 2 H. Bl. 275 ; *Omealy v. Newell*, 8 East, 364, 373. See Evidence Act, 1898 (*ante*), and (Commonwealth) State Laws and Records Recognition Act, (*post*).

An affidavit made abroad may be sworn before a magistrate there, but his signature and his authority to administer an oath must be verified in like manner : *Omealy v. Newell*, *supra* ; *Ex parte Hutchinson*, 5 C.B. 499 ; see also *Re Cooper*, 18 C.B.

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N.S. 220; 34 L.J.C.P. 145; or by the certificate of a British consul acting in this case as a notary public: 6 Geo. 4, c. 87, s. 20; *Re Barber*, 4 Dowl. 640.

A notarial certificate proves itself: *Cole v. Sherard*, 11 Exch. 482; as to its effect, see *Chesmer v. Noyes*, 4 Camp. 129.

In *Ferguson v. Benyon*, 16 W.R. 71, 1867, the M.R. in Ireland took judicial notice of the signature of a person certified under the hand of the secretary of state for India to be a person lawfully authorised to administer oaths there.

Affidavits and notarial acts may now be made and done abroad before and by English ambassadors and other diplomatic agents, and before consuls; and may be received in evidence without proof of the seal or signature of such ambassador or official person which they may purport to have affixed to them: 18 & 19 Vic. c. 42. And see as to affidavits sworn before a J.P., the Oaths Act, 1900, s. 26 (*ante*).

The Jurat.

See R. 383 (*infra*).

In the jurat must be stated the date (but see R. 383) of swearing the affidavit: *Blackwell v. Allen*, 7 M. & W. 146; as also the place and county where it is sworn, if sworn before a commissioner: *Cass v. Cass*, 1 D. & L. 698. The place, however, may be stated by reference, if it be mentioned in the body of the affidavit: *Grant v. Fry*, 8 Dowl. 234.

If the affidavit be sworn before a commissioner, the words "before me" must be inserted in the jurat, and the omission of these words cannot be waived: *R. v. Bloxham*, 2 D. & L. 168. See *Mock Sing v. Dat*, (1902) 2 S.R. 333; 19 W.N. 230; *Vacuum Oil Co. v. Cole*, 20 W.N. 35. It should appear that the person before whom it is sworn is a commissioner of the court in which it is entitled; but it is no objection that the affidavit is entitled in the Queen's Bench, and is stated to be sworn before a commissioner of the Exchequer, unless it be shown that that commissioner is not a commissioner of the Queen's Bench: *Cheney v. Courtnois*, 13 C.B., N.S. 634; 32 L.J.C.P. 116.

If the affidavit be made by two or more persons, their several names must be written in the jurat: R.G., H.T. 1853, r. 139. See R. 383 (*infra*).

If the affidavit be made by a person who appears to be illiterate, the fact that the affidavit was read to the party making it, and that the deponent seemed perfectly to understand the same, ought to be stated in the jurat: *Haynes v. Powell*, 3 Dowl. 599; R.G., H.T. 1853, r. 141. See R. 384 (*infra*.) When the deponent makes his mark, it should appear from the jurat that the mark was made by the deponent: *Wilson v. Blakey*, 9 Dowl. 352.

If sworn abroad, the jurat ought to state the place specially:—so held in *Walker v. Christ ian*, by *Bosanquet*, J., after consultation with the judges: Chit. Pract., 12th ed., vol. ii., p. 1621.

Where an affidavit is made by a foreigner in English, an interpreter must be sworn to interpret it truly, and the jurat should state that the interpreter was so sworn and did so interpret: *Bose v. Solliers*, 4 B. & C. 358. If the affidavit be in a foreign language, there must be another affidavit by an interpreter as to its translation and meaning: *Re Eady*, 6 Dowl. 615.

A rule of the Superior Courts provides, that no affidavit shall be read or made use of in the jurat of which there shall be any interlineation or erasure: R.G., H.T. 1853, r. 140, R. 387, (*post*.) A line drawn through two words in the jurat, leaving them, however, perfectly legible, is an erasure within this rule, and vitiates the affidavit: *Williams v. Clough*, 1 Ad. & E. 376. Striking out the date mentioned in the jurat with a pen and introducing the right date, is an erasure within the meaning of the above rule: *Chambers v. Barnard*, 9 Dowl. 557.

An alteration in the jurat, or other parts of an affidavit after it is sworn, nullifies it; it cannot be used. But it may be amended, s. 259 C.L.P. Act, *ante*. But if the jurat be struck out, it may be re-sworn. If an interlineation or alteration is made in an affidavit previously to its being sworn, it should be noticed by the person before whom it is sworn, by placing his initials in the margin, for, if the objection is taken, the affidavit cannot be read. See R. 386 (*post*.)

The same observations apply to affirmations. The jurat of an affirmation will, of course, be "affirmed, " before me, &c. See the Oaths Act, 1900, s. 12 (*ante*); R. 393, (*post*.)

An affidavit of which the jurat is defective cannot be used, and a rule procured on it will be discharged with costs: *Cobbett v. Oldfield*, 16 M. & W. 469. *Mock Sing*

v. *Dat*, (1902) 2 S.R. 333 ; 19 W.N. 230. In the note to 8 C.B. 618, cases are collected where this rule was followed ; but see *Brunswick v. Slowman*, 8 C.B. 618, *per Wilde*, C.J. **RULES 380-385.**

Signature of Deponent.

An affidavit ought to be signed by the deponent ; if he cannot write he ought to make his mark : *Wilson v. Blakey*, 9 Dowl. 352 ; *Nathan v. Cohen*, 3 Dowl. 370. The usual signature ought to be used, though it do not correspond with the name given to the deponent in the affidavit : *Hands v. Clements*, 1 D. & L. 379. An affidavit without deponent's signature, made in Germany, was admitted, it appearing that such was the practice in Germany : *Re Eady*, 6 Dowl. 615.

Exhibits.

Exhibits referred to in or attached to affidavits must be specified : *Re Joseph Allison*, 3 W.R. 62, Ex., M.T. 1854 ; and copies of such exhibits, if not filed, must be given to the other side, if required : *Tebbutt v. Ambler*, 7 Dowl. 764.

Filing.

All affidavits must be filed within the time (if any) prescribed, unless leave to file them afterwards be obtained : R.G., H.T. 1853, r. 145 ; R 391 (*infra*). A party who has taken office copies of affidavits cannot object to their not having been filed in time : *Re Mackay*, 1 D. & L. 206.

Amendment.—It may be added that the powers of amendment given to the Court and Judges by s. 259, C.L.P. Act, expressly extend to "any affidavit jurat or title of affidavit," so that errors may be amended ; but it is safer to follow the Rules strictly.

381. Every affidavit made in New South Wales to be used in any proceeding in the Court in any jurisdiction shall commence in the following or some equivalent form :—"On the day of in the year one thousand nine hundred and , A.B., of (*add the place and degree, calling, or description*), being duly sworn, makes oath and says as follows :—"After which the deponent's statement shall be throughout in the first person ; and the word "last" or "instant," if occurring in the affidavit, may be taken in connection with the date so given. Form of affidavit. 1 Dec., 1856. R. 14.

See note, *supra*, p. 426.

382. Every such affidavit exceeding three folios shall be divided into paragraphs, each of which shall be numbered for more convenient reference. Paragraphs. 1 Dec., 1857. R. 2.

See note, *supra*, p. 427.

383. The jurat of every such affidavit shall be as follows :—"Sworn by the deponent" (*or, where more than one*, by the two deponents, *or* by the several deponents) "on the day first above mentioned at (*place*) before me, C.D.," adding the words, "A Commissioner for Affidavits," where the affidavit is sworn before any such Commissioner. Jurat. 1 Mar., 1856. R. 15.

And see R. 387 (*infra*), and note, *supra*, p. 428.

And *Vacuum Oil Co. v. Cole*, (1903) 20 W.N. 35.

384. In all cases where any deponent is unable to write, the officer administering the oath shall add to the jurat as follows :—"The deponent (*or* A.B., one of the deponents) having heard the contents read, and appearing to me to understand the same." Deponent unable to write. Ibid., R. 16.

See note, *supra*, p. 429.

385. The Court or a Judge may allow any affidavit not in accordance with the four last preceding Rules to be received where justice appears so to require, on such terms as to costs and otherwise as to such Court or Judge seem meet. Irregular affidavits. Ibid., R. 17.

RULES
386-394.

Alterations to be noticed in margin.
28 Feb., 1886,
R. 35.

Alterations in jurat not allowed.
H.T., 1853,
R. 140.

Indorsements.
1 March, 1856,
R. 13.
14 Nov., 1894.

Affidavits sworn before plaintiff's solicitor.
H.T., 1853,
R. 142.

Where town Solicitor agent of country Solicitor.
Ibid., R. 143.

Affidavits filed out of time.
Ibid., R. 145.

Affidavit on which rule granted to be produced in Court.
Ibid., R. 146.

Affirmations and declarations.
1 March, 1856,
R. 18.

Mode of service.
H.T., 1853,
R. 165.
1 March, 1856,
R.R. 23, 24.
24 March, 1893,
R. 15.

386. No affidavit having any erasure or interlineation therein shall be used in any proceeding without leave of the Court or a Judge, unless such erasure or interlineation be noticed in the margin opposite thereto by the officer taking such affidavit.

387. No affidavit in the jurat of which there is any erasure or interlineation shall be used in any proceeding in the Court.

But a jurat may be amended : s. 259, C.L.P. Act, *ante*.

388. Every affidavit filed shall be legibly indorsed with the name of each deponent, and with the date upon which it has been sworn.

Cohen, J., pointed out that parties filing affidavits improperly endorsed would not be allowed any costs in respect of such affidavits : *Anon.*, (1896) 12 W.N. 79 ; and in *Myers v. Weisener*, (1896) 12 W.N. 153, said that he would refuse to allow such affidavits to be read. Subsequently applications were dismissed on this ground :—*Zobel v. Croudace*, (1899) 15 W.N. 288 ; *Howell v. Camden Exploration Co.*, *Ibid.* 289. See R. 378 and notes, *ante*.

389. No affidavit of the service of process shall be deemed sufficient if sworn before the plaintiff's own Solicitor, or the clerk of such Solicitor.

390. Where an agent in town of a Solicitor in the country is the Solicitor on the record, an affidavit sworn before the Solicitor in the country shall not be received, and an affidavit sworn before a Solicitor's clerk shall not be received in cases where it would not be receivable if sworn before the Solicitor himself, but this rule shall not extend to affidavits to hold to bail.

391. Where a special time is limited for filing affidavits, no affidavit filed after that time shall be used in Court or before the Prothonotary, unless by leave of the Court or Judge.

See R.R. 321-323 (*ante*).

392. No rule which the Court has granted upon any affidavit shall be of any force unless such affidavit was actually made before such rule was moved for, and was produced in Court at the time of making the motion.

A rule drawn "on reading affidavits" is understood to include the annexures to the affidavits : *Ex parte Dooley*, (1866) 5 S.C.R. 343.

393. The Rules relating to affidavits shall equally apply to affirmations and solemn declarations so far as such Rules are applicable thereto respectively.

Service of Proceedings.

394. All process, pleadings, notices, summonses, orders, rules, and other proceedings may be served on any Solicitor by being left in the daytime between the hours of nine and five at the lastly registered office of such Solicitor, or of his Sydney agent.

As to service of writ of summons, see s. 17., C.L.P. Act and notes, *ante*.

Where a party sues or defends by attorney, so long as the attorney's authority continues, service must be on him and not on the party : R. 18 (*ante*) ; *Chitty's Archbold*, 164 ; see *Keisor v. Ponder*, (1886) 2 W.N. 112, where notice of trial given by a plaintiff in person, who had sued by attorney, was held bad.

395. Where a party sues, defends, or otherwise acts in person, he shall, at the time of taking his first step, enter in a book to be kept for that purpose at the Prothonotary's Office an address within two miles from the General Post Office, at which all pleadings, notices, summonses, orders, rules, or other proceedings not requiring personal service shall be left.

And see R. 19 (*ante*).

**RULES
395-400.**

Address for service where party sues or defends in person.
18 Feb., 1886,
24 March, 1893,
R. 15.

396. If the office of any Solicitor or of his Sydney agent has not been duly registered, or if a party suing, defending, or otherwise acting in person has not entered his address as by the last preceding rule prescribed, or if the address so entered is more than two miles from the General Post Office, then the posting in the Prothonotary's Office of any pleading, notice, summons, order, rule, or other proceeding for such Solicitor or such party shall be deemed a sufficient service.

Service by posting proceedings.
H.T., 1863,
R. 165.
15 Feb., 1886

As to registration of the solicitor's place of business, see R. 15 (*ante*); and see *Black v. Chinnery*, (1894) 11 W.N. 54.

Where a defendant had not appeared, a chamber summons was held properly served on him by leaving a copy of the summons on the table in his office in Sydney, and showing it to his clerk: *Dembicki v. Tucker*, (1884) 1 W.N. 72.

397. When a defendant has not entered an appearance, no further documents need be served upon him, except for the purpose of attachment, unless a Judge otherwise orders.

When defendant has not appeared.

398. It shall not be necessary to the regular service of a rule or order that the original rule or order should be shown, unless sight thereof be demanded, except in cases of attachment.

Original need not be shown unless demanded.
H.T., 1853,
R. 163.

But in cases of attachment the defect of service may be waived as by appearing and asking for an adjournment and filing affidavits: *Baird v. Ah Hung*, (1898) 15 W.N. 126; *R. v. Solomon*, (1868) 8 S.C.R. 30.

Computation of Time.

399. Whenever in any Rule the words "clear days" are used, or a certain number of days is specified with the words "at the least" added, the days shall be reckoned exclusively of Sunday and of Christmas Day or Good Friday, when intervening, and exclusively both of the day of notice (or demand or summons, as the case may be) and of the day on which the thing or matter is to be done or to come on to be heard (or moved, as the case may be), but not exclusively of any other days or day.

Where clear days specified.
1 March, 1856,
R. 8.

Clear days.—On the 1st March, the last day for pleading, the defendant got an order for two clear days' further time to plead; held that this order gave him till the 4th March to file his plea and judgment could not be signed till the 5th: *Johns v. Sydney Leather Co.*, (1892) 8 W.N. 100.

400. In all other cases a specified number of days shall be reckoned inclusively of the day of notice, demand, or summons, and exclusively only of the day of performance, hearing, or motion.

Where clear days not specified.
Ibid., R. 9.

In all other cases.—By s. 4 of the C.L.P. Act a writ of summons is to be in the form in the 2nd Schedule which commands appearance within a certain number of days (specified by R. 33 (*ante*)) "inclusive of the day of service." Where writ was served on the 8th June and judgment signed on the 16th, defendant having eight days to appear, it was held that the 15th was his last day for appearance, the Rule not applying to a writ of summons: *Lazarus v. Stutchbury*, (1886) 7 N.S.W.R. 328; 3 W.N. 23, on appeal from 2 W.N. 114.

RULES

400-408.

Christmas and
Easter.
6 July, 1896.

Where time had begun to run and vacation intervened and time ceased to run in vacation, time began to run again on the Sunday when vacation ended on a Saturday, although term did not begin till the Monday: *Stutt v. Neill*, (1887) 4 W.N. 57.

401. Christmas Day and the three following days, and the days between Thursday next before and the Wednesday next after Easter day, shall not be reckoned or included in any rules, notices, or other proceedings, except notices of trial.

Christmas and Easter.—There were no Rules of this Court dealing with Christmas and Easter until the Rule of 6th July 1896 (re-enacted here) and the question was discussed in several cases whether the English Rule applied: *Smith v. Booker*, (1896) 12 W.N. 110; *Cox v. Bath*, (No. 1) (1893) 9 W.N. 160; *Cox v. Bath*, (No. 2) (1893) 9 W.N. 170.

Time expiring
on Sunday or
close day.

402. When the time for doing any act or taking any proceeding expires on a Sunday, or other day on which the offices of the Court are closed, and by reason thereof such act or proceeding cannot be done or taken on that day, such act or proceeding shall, so far as regards the time of doing or taking the same, be held to be duly done or taken if done or taken on the day on which the offices are next open.

Sunday or holiday.—This Rule which is new, is in accordance with what seems to have been the English practice and with *Gillespie v. Walker*, (1890) 6 W.N. 142.

Search.

Unauthorised
searches not
allowed.
23 June, 1884.

403. No person, without the express leave of a Judge, shall be allowed to search in the offices in any jurisdiction of the Court for the papers in any suit, cause, or proceeding, unless such person is a party to such suit, cause, or proceeding, or is acting for such party as his Solicitor.

Fees.

Court fees.
22 August, 1896.

404. The fees to be demanded and paid in the Court in its Common Law Jurisdiction shall be those set out in the Second Schedule hereto: Provided always that any fee in the said Schedule may be remitted on the order in writing of the Prothonotary or Chief Clerk in any case where it is made to appear that the party is unable from poverty to pay the same.

Commissioners
for affidavits.
Ibid.

405. The fees to be demanded by and paid to Commissioners for Affidavits shall be those set out in the Third Schedule hereto.

Associate to
deliver account
of Court fees.
18 March, 1892.

406. Upon the trial of every cause, the Associate shall make out, and immediately after the conclusion of the cause shall deliver to the Solicitor for each party, or if either party be not represented by a Solicitor, to such party, an account of the Court fees payable by such party.

Fees to be paid
within one week.
Ibid.

407. The Solicitor or party so receiving such account shall, within one week of the receipt thereof, pay to the Prothonotary the amount of the said fees. And if default be made in payment of the said fees within the time specified as aforesaid, the Prothonotary shall report to the Court the name of the Solicitor or party so making default.

Costs Generally and Taxation.

Scale of costs.
1 Sept., 1898,
R. 1.

408. The three several scales of costs in actions at law mentioned in the Fourth Schedule hereto are hereby fixed and established.

See C.L.P. Act, s. 266 (*ante*).

409. The lowest scale shall extend to all cases where the amount sued for or the value of the matter sought to be recovered does not exceed £50; the second scale to all cases where the amount sued for or the value of the matter sought to be recovered exceeds £50, but does not exceed £100; and the highest scale to all other cases.

RULES**409-415.**

Application of
scales.
1 Sept., 1898,
R. 2.

See Costs, p. 151 (*ante*).

410. Every party liable to pay costs (whether then for taxation or not) shall be entitled to have on demand from the adverse party a copy of his bill.

Delivery of bill.
8 May, 1896,
R. 6.

See Costs, p. 151 (*ante*).

An action was settled on the terms that defendants should pay untaxed a lump sum to satisfy the plaintiffs' costs as between attorney and client. Defendants paid the plaintiffs the stipulated amount and agreed with them, the plaintiffs' attorneys not being parties to the agreement, that the plaintiffs' attorneys should supply the defendants with a bill of costs for taxation; this the plaintiffs' attorneys refused to do, and on application by the defendants to compel them to supply a bill, the Court held that they could not be compelled to do so: *In re Rolin & Gilder's Costs*, (1896) 17 N.S.W.R. 204; 13 W.N. 65.

411. Where either party in any defended cause or matter desires to have his costs taxed, he shall serve the adverse party, at least twenty-four hours before the taxation, with notice of the day and hour appointed in that behalf by the taxing officer; together with a copy of the bill of costs, and affidavit of increase, if any.

Notice of
taxation.
Ibid.
H.T., 1883,
R. 69.

412. Where upon an application to refer an attorney's bill for taxation, under the 25th section of the Legal Practitioners Act, 1898, the rule or order has been made *ex parte*, no rule or order for judgment shall be made except on notice of motion or a rule or summons to show cause.

Judgment on
allocatur.
28 Feb., 1886,
R. 29.
8 May, 1886,
R. 6.

413. Notice of taxing costs shall not be necessary in any case where the defendant has not entered an appearance.

Taxation where
defendant has
not appeared.
H.T., 1883, R. 61.

414. In all cases of taxation of costs the taxing officer may take evidence either wholly or in part *viva voce*, or by affidavit, as he thinks fit; and may issue subpoenas for the examination of witnesses, and for the production before him of all books, papers, and documents, which in his opinion may be necessary or advisable, and may report specially to the Court the result of any such taxation, together with such special circumstances in reference thereto as he thinks proper.

Taxing officer
may take
evidence.
Report on
taxation.
15 Feb., 1887.

415. When a bill has been taxed in any action or proceeding at law, an order for review of the taxation may after summons to show cause be made by any Judge.

Review of
taxation.
8 May, 1886,
R. 7.

The affidavit in support of the summons must show the amount in dispute and the items of the bill objected to: *Ex parte Luckenstein*, (1898) 14 W.N. 221.

A review is only granted on questions of principle. "The Court will only interfere when it sees that the Prothonotary has proceeded on some wrong principle": *Armstrong v. Commercial Bank*, (1891) 8 W.N. 39.

The Court cannot interfere where the taxing officer has exercised his discretion unless that discretion has been exercised upon a wrong principle, but it will interfere if he has not exercised his discretion where he ought to have done so, but has acted upon some arbitrary rule, "clipping and shaving the fees upon no principle": *O'Rourke v. Commissioner for Railways*, (1893) 10 W.N. 49. And see the cases cited under s. 266, C.L.P. Act, *ante*.

Under special circumstances the Prothonotary was held to have taxed as an arbitrator and his taxation not subject to review: *Trevor Jones v. Ritchie*, (1896) 12 W.N. 173.

RULES

416-425. costs of the application shall be in the Judge's discretion.

Costs of application.
8 May, 1856,
R. 8.

Notice to taxing officer.
13 June, 1894,
R. 1.

Where the application for review succeeds, the practice is to allow the successful party the costs of the summons: *Howard v. Swindle*, (1899) 16 W.N. 63.

417. No review of taxation shall be granted in any jurisdiction, unless the moving party within fourteen days after the date of the allocatur serves upon the taxing officer a copy of the rule *nisi*, notice of motion, or summons to review, together with the affidavits in support thereof.

Where the rule *nisi* and affidavits had not been served on the Prothonotary (the taxing officer) it was discharged with costs, although the Prothonotary had himself signed the rule *nisi*: *Ex parte Thomson*, (1896) 13 W.N. 16.

Further time for service.
Ibid., R. 8.

418. Provided that a Judge upon application made to him before the expiration of such fourteen days may in any case allow further time for such service.

Time occupied upon hearing or trial to be noted.
4 Nov., 1894.

419. The proper officer of the Court present at any hearing or trial before the Court or a Judge shall make a note of the times at which such hearing or trial commences and terminates respectively, on each day on which the same takes place, for communication to the taxing officer if required.

Scale of costs.
8 May, 1856,
R. 4.

420. Subject to the preceding Rules, the taxing officer shall tax all bills of costs in actions and other proceedings according to the scale of fees and allowances now in use, so far as the same shall apply; and for all business not comprehended within that scale the like fees shall be allowed as would have been allowed in respect of business of the like kind in the Queen's Bench before the passing of the Supreme Court of Judicature Act, 1873.

Briefs of Counsel.
H.T. Directions,
1853.

421. The taxing officer shall allow only the copying of such documents or parts of documents to accompany briefs as he considers necessary for the instruction of Counsel or for use at the trial.

See cases cited s. 266, C.L.P. Act, *ante*.

Counsel's fees for pleadings, &c.
Ibid.

422. The taxing officer shall have discretion in all cases to allow as between party and party the fees of Counsel for drawing pleadings or other proceedings, whether special or otherwise, and for advising.

Declaration when unnecessary.
Ibid.

423. When judgment is signed on a cognovit, or on a Judge's order authorising the plaintiff to sign judgment, no declaration to ground judgment shall be necessary, or allowed on the taxation of costs.

Costs of several issues.
H.T. 1853, R. 62.

424. When issues in law and fact are raised, the costs of the several issues, both in law and fact, will follow the finding or judgment. If the party entitled to the general costs of the cause obtains a verdict on any material issue, he will also be entitled to the general costs of the trial; otherwise the costs of the trial shall be allowed to the opposite party.

See note on Costs, p. 155 (*ante*).

Solicitor's lien.
Ibid., R. 63.

425. No set-off of damages or costs between parties shall be allowed to the prejudice of the Solicitor's lien for costs in the particular suit against which the set-off is sought. Provided, nevertheless, that interlocutory costs in the same suit awarded to the adverse party may be deducted.

But the attorney's lien is an equitable right which he may waive by his conduct : *Wilson v. Smith*, (1880) 1 N.S.W.R. 310.

RULES
425-428.

The first part of this Rule applies only to the case of costs in different suits : *Scott v. De Richebourg*, 20 L.J.C.P. 263.

"The result of my view of the cases from *Howell v. Harding*, 8 East 362, to the last case on the subject, is that in the case of proceedings in different Courts or distinct actions in the same Court, a set-off will not be allowed to the prejudice of an attorney's lien, but that it will be so when the proceedings arise in the same suit or action" : *Adams v. Young*, 20 N.S.W.R. 307 ; 16 W.N. 58, *per Stephen*, J.

The solicitor's lien over moneys recovered in a Common Law action may extend to costs incurred in an Equity suit dealing with the same matter : *Lynch v. Levinge*, (1893) 14 N.S.W.R. Eq. 168 ; 9 W.N. 125. But see *Want v. Moss*, (1892) 13 N.S.W.R. Eq. 96 ; 9 W.N. 15.

See further on the subject of solicitor's lien : *Vaughan v. Chenhall*, (1898) 19 N.S.W.R. 123 ; 14 W.N. 163 ; *Lyons v. Castle*, (1893) 14 N.S.W.R. Eq. 135.

Interlocutory costs.—Defendant being entitled to interlocutory costs under a Judge's order, had that order made a rule of Court, after plaintiff had recovered a verdict ; the order making the Judge's order a rule of Court was set aside as the defendant knew his costs under the Judge's order were the subject of set-off : *Broughston v. Vincent*, (1883) 4 N.S.W.R. 59.

Costs of proceedings before the Privy Council ordered by the Privy Council to be paid by one party to another are not the subject of set-off : *Adams v. Young*, (1899) 20 N.S.W.R. 169 ; 15 W.N. 269 ; but the costs of the proceedings in this Court leading to the decision just mentioned are the subject of set-off : *Adams v. Young*, (1899) 20 N.S.W.R. 305 ; 16 W.N. 58.

426. No costs shall be allowed to the party succeeding in a cause in respect of any interlocutory motion or proceeding, unless he also succeeded therein (either in the application, if made by himself, or in his opposition thereto, as the case may be), or unless the costs thereof were awarded to him or expressly made costs in the cause. But nothing in this Rule shall be construed to prevent the Court or Judge before whom any motion or proceeding is had from making such order respecting costs as such Court or Judge might have made without reference to this Rule.

Costs of
interlocutory
proceedings.
28 Feb., 1886
R. 24.

Where interlocutory costs, as of a commission to examine witnesses, are made costs in the cause, if they refer to issues on which one party succeeded, they may be taxed as his costs on those issues, although the other party has the general costs of the cause : *Dubbo Refrigerating Co. v. Rutherford*, (1898) 14 W.N. 180 ; *Brace v. Kempson*, (1895) 11 W.N. 147.

Admission of Solicitors.

427. In the following Rules, unless the context or subject matter otherwise indicates or requires,—

"Articled clerk" means a person who has been articled to a practising solicitor, and includes a person whose articles have expired.

"Board" means the Board of Examiners appointed under these Rules.

"Graduate" means a graduate of the University of Sydney or some other University recognised by it.

"Secretary" means the Secretary to the Board.

Qualification.

428. The following persons only shall be eligible for admission as Solicitors :—

- (a) Attorneys or Solicitors of the Superior Courts of England or Ireland, and Writers to the Signet of Scotland, who have resided in New South Wales for three months preceding the notice referred to in Rule 477. 18 Dec., 1877,
R. 3.

**RULE
428.**18 Dec., 1877,
R. 2.

- (b) Attorneys, Solicitors, or Proctors of the Supreme Court of any State of the Commonwealth of Australia, who have resided in New South Wales for three months preceding the notice referred to in Rule 477, if the Judges are satisfied that in such State a standard of qualification substantially equal to that provided by these Rules has been adopted and is acted upon, and that corresponding eligibility for the admission of Solicitors of the Court to the Courts of such State has been established.

31 March, 1887.

- (c) Articled clerks who have served the term of five years' clerkship, or if they were graduates at the time of entering into articles, the term of three years' clerkship, and have passed the examinations prescribed by these Rules.

25 Feb., 1889,
R. 2.

- (d) Persons who have been articled to an Attorney or Solicitor of one of the King's Superior Courts of Great Britain or Ireland or to a Writer to the Signet of Scotland, and have served the full term of such articles, and have passed the intermediate examinations in England, Ireland, or Scotland, as the case may be, and also the final examination prescribed by these Rules.

Ibid.

- (e) Persons who have been articled to such Attorney or Solicitor or Writer to the Signet, or to a Solicitor of the Court, and have served under such articles or any assignment or reassignment thereof the full term of such articles partly in England, Ireland, or Scotland, and partly in New South Wales, and have passed their intermediate examinations either in England, Ireland, Scotland, or under these Rules, and also the final examination prescribed by these Rules.

Provided that the time occupied in travelling between New South Wales and England, Ireland, or Scotland, shall be made up by service under articles which may be extended for the requisite period.

7 June, 1898.

- (f) Persons who have completed the term of five years of clerkship in the offices of the Supreme Court or the office of the Crown Solicitor, and produce a certificate from the head of any such office that they have for at least two of such five years been Chief Clerk, or clerk in charge of any branch, of any one of such offices, and who have passed the final examination prescribed by these Rules.

9 March, 1900,
R.R. 1, 2.

- (g) Persons who have completed the term of ten years of clerkship in the office or offices of a Solicitor or Solicitors practising in New South Wales, and have been for at least five of such ten years managing clerk in such office or offices, and after obtaining the permission of the Judges as hereinafter provided, have passed the intermediate law examination and the final examination prescribed by these Rules.

Act 1898, No.
22, s. 14.

- (h) Barristers of five years' standing from the date of their admission in New South Wales, whose names have been on their own application removed from the roll of barristers in the Court.

(a) See Charter of Justice, clause 10 (*post*).

(b) See RR 484 *et seq.*, *post*.

Tasmanian attorneys have been admitted: *Ex parte Davenport*, (1886) 3 W.N.

**RULE
428.**

A Canadian attorney was not admitted though he had been admitted in Tasmania. There is no Rule providing for the admission of Canadian solicitors and this Rule only applies to solicitors who have served articles and passed examinations in other Australian colonies: *Ex parte Brown*, (1888) 4 W.N. 153; see *Ex parte Gausden*, (1888) 4 W.N. 153.

A South Australian solicitor was admitted even though he had not matriculated, there being no University there at the time he was articulated: *Ex parte Whittell*, (1887) 4 W.N. 97; see *Ex parte Stephenson*, (1880) 1 N.S.W.R. 49.

Queensland solicitors are admitted: *In re Farrell*, 18 W.N. 116. A Queensland solicitor being in contempt of the Supreme Court of Queensland, was refused admission; but afterwards admitted, having purged his contempt: *Ex parte Godfrey*, (1879) 2 S.C.R. N.S. 30.

The attorney must have ceased to practise in the other State (R. 484, Form No. 38, Sch. I, *post*): *Ex parte Morriss*, (1887) 3 W.N. 105; see *Ex parte Edmondson*, (1899) 15 W.N. 287.

(c) See RR. 434 *et seq.*, *post*.

Articles may be served either with one solicitor or by assignment with others. The clerk may serve part of his articles, not exceeding one year, with the Sydney agent of his country master without assignment: R. 441 (*post*).

A clerk was admitted though his articles had been assigned in blank: *Re Best*, 17 W.N. 194.

Where the master had been struck off the rolls an order was made for the assignment of a clerk's articles generally, the application being made on the last day of term; assignment to be made within a month: *Ex parte Robison*, (1891) 7 W.N. 147.

Where a clerk after serving three and a half years of his time went into other business, the Court allowed him to enter into fresh articles for five years, but counting two and a half as already served: *Ex parte Yates*, (1892) 8 W.N. 95.

Where the master died and his executrix refused to take out probate, the Court made an order for assignment of a clerk's articles: *Ex parte Bland*, (1877) Knox 521.

Where the clerk had been absent as a volunteer on military service for 112 days, his articles were extended by that period: *Ex parte Shipway*, (1885) 2 W.N. 23.

Articles were extended where the clerk had not passed the intermediate examinations during the period of his original articles, or fresh articles were allowed to be entered into so that he might pass while articulated: *Ex parte Body*, 4 W.N. 133; *Anon.*, 4 W.N. 80; *Ex parte Deane*, 4 W.N. 88, 98; *Ex parte McGuinn*, 5 W.N. 18; *Ex parte Proctor*, 6 W.N. 32. So, where the clerk had been ill: *Ex parte Saunders*, 4 W.N. 97; *Ex parte McPhail*, 8 N.S.W.R. 166; 3 W.N. 138; *Ex parte Gray*, 4 W.N. 157; *Ex parte Lang*, 4 W.N. 163; *Ex parte Pigott*, 5 W.N. 63; *Re Hall*, 18 W.N. 273.

A master having absconded, the clerk went on working in his office till he found the master did not return; the Court in allowing him to enter into fresh articles would not allow the time served after the master had absconded to count: *Ex parte Gillespie*, 14 W.N. 6.

After articles have expired the Court cannot extend them; the clerk may be allowed to enter into fresh articles: *In re Everitt*, 13 W.N. 204.

Where want of means had forced the clerk to leave his service, the Court allowed him to enter into fresh articles to complete his time of service: *Ex parte Curtis*, 7 W.N. 91.

Order by Judge: confirming order.—A Judge may make these orders as for the Court, but his order must be confirmed; & a Judge should only act in cases of great urgency: *Ex parte Selk*, 16 W.N. 45.

Where a solicitor had been struck off the rolls on his own application, he may be restored to the rolls: *Ex parte Millard*, 8 W.N. 56.

And even where he has been struck off for misconduct, he may, under certain circumstances, and after a lapse of time be restored: see *Re Moss*, 1 S.R. 295; 18 W.N. 191; *Re Meagher*, 19 W.N. 224; *Ibid.*, 17 N.S.W.R. 157; 12 W.N. 148; *Re Rofe*, 18 W.N. 174.

Where a clerk is ordered to enter into fresh articles the Court will not order that the fees payable should be the same as on an assignment: *Ex parte Bowden*, 15 W.N. 158.

Graduates.—A person who has passed the necessary examinations for a B.A. degree is regarded as within the Rule though not actually invested with the degree: *Ex parte Fletcher*, 5 W.N. 64.

RULES
428-436.

In case of assignment of articles from England such articles might be extended for the time taken on the voyage, even before this Rule: *Ex parte McKensie*, 5 W.N. 62.

Where an interval had elapsed between the service in Ireland and here, during which the service had been suspended through the clerk's illness, fresh articles were directed to be entered into: *Ex parte Sullivan*, 4 W.N. 97.

(g) See RR. 458 *et seq.*, *post*.

(h) See Legal Practitioners Act, 1898, No. 22, s. 14 (*ante*), and R. 483 (*post*).

Board of Examiners.

Constitution of Board.
3 Nov., 1897.
17 June, 1902.
RR. 3 and 3.

429. The Board of Examiners shall consist of two Barristers and four Solicitors, to be annually appointed by the Judges, and a President.

Tenure of office.
Ibid.

430. All members of the Board shall continue in office until their successors have been appointed.

President
Ibid.

431. The Professor of Law in the University of Sydney, or such other person as the Judges may appoint, shall be the President of the Board.

Quorum.
Ibid.

432. Three members of the Board shall form a quorum.

Secretary.
18 Dec., 1877.
R. 21.

433. The Chief Clerk of the Court, or such other person as the Judges may appoint, shall be Secretary to the Board, and shall attend all meetings of the Board and keep minutes of its proceedings and conduct its correspondence, and perform such other duties as the Board may require.

Articles.

Persons under seventeen not to be articulated.
Ibid., R. 4.

434. No person under seventeen years of age shall be articulated with a view to his admission as a solicitor.

Where a clerk had been articulated in his seventeenth year, the Court refused to allow him to go up for final examination till he had served five years from the age of seventeen: *Ex parte Clinton*, 1 S.C.R. N.S. 67.

Introduction to Judge.
Ibid.

435. No person shall be so articulated until he has been introduced by his intended master, or the Sydney agent of such master, to a Judge, and has been approved of by such Judge.

Introduction has been allowed after the articles have been entered into *nunc pro tunc*: *Ex parte Carruthers*, Knox 295; as in the case of clerks articulated to country solicitors: *Ex parte Potts*, 3 W.N. 25; *Ex parte Kennedy*, 3 W.N. 105; but in future such applications will not be allowed: *Ex parte Meagher* 4 W.N. 97.

Introduction to a Judge on circuit was enough (even when the Rule said "Judges" *Re Moore*, 8 W.N. 134.

Introduction by the Sydney agent was sufficient (before the Rule was in its present form): *Ex parte Taylor*, 3 W.N. 138.

Where the old Rule said "Judges" the certificate was allowed to be altered to date as on the day of introduction to the first Judge: *Ex parte Doyle*, 6 W.N. 132.

Although the clerk's father signed the articles before the introduction (he and his master signing after) he was allowed to go up for examination: *Ex parte Barnes*, 6 W.N. 94.

Certificates of Entrance Examinations, &c.
10 Aug., 1880.
31 Mar., 1887.
21 Sept., 1894.
R. 1.

436. Before such introduction, such person, if he is not a graduate, shall produce to the Secretary—

- (a) a certificate of his having passed in the University of Sydney, or some other University recognised by it, a matriculation examination in all subjects required by the University of Sydney for intending articulated clerks; or

(b) a certificate from the Registrar of the University of Sydney of his having passed some equivalent examination before Professors or Examiners appointed by the Senate thereof ; or

(c) a certificate from the said Registrar of his having matriculated and attended the University course of lectures for one whole academic year ; or

(d) a certificate of his having passed, in England, Scotland or Ireland, the preliminary examination which articled clerks are there required to pass ;

and shall file a copy of such certificate.

Graduate.—See *Ex parte Fletcher*, 5 W.N. 64, cited R. 428 (*ante*).

437. At the time of such introduction, the intended master or his agent shall produce to the Judge satisfactory certificates of the character of such person and his fitness to be admitted to articles, and also the intended articles, together with the testamur of the degree of such person, or a certificate by the Secretary of compliance with the last preceding Rule indorsed upon such articles.

Certificates of character, &c.
18 Dec., 1877,
R. 4.

438. No solicitor shall be allowed to have more than two articled clerks serving under articles at the same time. Provided that this Rule shall not apply to any Solicitor who at the date hereof has three clerks serving him under articles, until the number of such clerks has been reduced to two.

Number of
Articled Clerks.
Ibid.

439. All articles of clerkship and assignments thereof shall be filed in the Court within one month from the date of the execution thereof.

Articles and
assignments to
be filed.
20 Nov., 1889.

Articles not having been filed, the Court refused an application for leave to file them *nunc pro tunc*, but allowed fresh articles to be entered into allowing the time served to count : *In re Spear*, 3 W.N. 134 ; and see *Re Vickery*, 18 W.N. 273.

440. No articled clerk during the term of his articles shall, without the leave of the Court, pursue any profession, trade, or business, other than the proper business of a solicitor.

Articled Clerk
not to pursue
other calling.
18 Dec., 1877,
R. 8.

Attending University lectures is not pursuing a profession, trade, or business : *Ex parte Fraser*, 3 W.N. 56.

An articled clerk may be executor and trustee of a will where his co-trustee carries on the testator's business : *In re O'Keefe*, 11 W.N. 110.

441. Every articled clerk may, without assignment, serve any part of the term of his articles not exceeding one year with the Sydney Agent of the Solicitor to whom he has been articled, and such service shall be equivalent to service for the same time with such Solicitor under such articles. Provided that such Agent shall be required to answer such questions and give such certificates as he would have been required to answer and give if such clerk had served him under articles of assignment.

Service with
Sydney Agent.
31 March, 1887.

Examinations.

442. All examinations shall be under the control of the Board.

Control of
Examinations.
17 June, 1907,
R. 2.

443. The examinations under these Rules shall be :—

Examinations.
Ibid., R. 1.

(a) an examination in Legal History ;

**RULES
443-451.**

- (b) an intermediate examination in Law ;
(c) a final examination in Law.

History
Examination.
17 June, 1902,
R. 1.

444. Every examination in Legal History shall be conducted by such person as may from time to time be appointed by the Judges.

Subjects of
intermediate law
examination.
18 Dec., 1877,
R. 6.

445. The subjects of the intermediate examination in law shall be the laws of real and personal property.

Subjects of Final
Examination.
17 June, 19-2,
R.R. 6 and 10.

446. The subjects of the final examination in law shall be as follows :—

Section 1.—The Law of Property and Principles of Conveyancing.

Section 2.—Equity, Probate, Divorce, Bankruptcy, and Company Law.

Section 3.—(a) Contracts, Mercantile Law, and Torts ; and (b) Criminal Law and Practice, and the Law of Evidence.

Section 4.—(a) Supreme Court Practice ; and (b) Inferior Courts Practice and Jurisdiction.

Books to be
notified.
Ibid., R. 7.

447. The Board shall, from time to time, with the approval of the Judges, notify the books in which they intend, after not less than six months thereafter, to conduct the examinations.

Place and time
of examinations.
Ibid., R. 4.

448. All examinations shall be held in Sydney at such place and on such days during each term as the Board shall appoint.

Examination
papers and
answers to
questions.
3 Nov., 1897.

449. All questions set in the law examinations shall be first considered and approved by the Board, and all answers to such questions shall be considered and marks allotted by two members of the Board, one of whom, in respect of sections 1, 2, and 3 of the final examination, shall be the President. Provided that in case of need, and with the approval of the Board, the President may delegate to any other member or members of the Board his duties in respect of any one or more of the subjects contained in such sections.

Examinations to
be passed by
graduates.
6 Dec., 1900,
R. 3.
17 June, 1902,
R. ..

450. Every articulated clerk who is a graduate at the time of entering into articles shall pass the intermediate law examination and the final examination, and may present himself for examination as follows :—

Intermediate Law.—6 months after date of articles.

Section 1.—9 months after first presenting himself for the intermediate law examination.

Sections 2 and 3.—9 months after first presenting himself for section 1.

Section 4.—6 months after first presenting himself for sections 2 and 3.

Exemptions of
Bachelors of
Laws.
21 Sep., 1894,
R. 13.

451. Provided that any articulated clerk who has attended the law lectures appointed by the University of Sydney, and has obtained the degree of Bachelor of Laws of the said University, shall be exempt from the intermediate law examination, and from sections 1, 2, and 3 of the final examination ; but he shall give all notices and pay all fees required in the case of an articulated clerk proceeding to final examination in section 4.

452. Every articulated clerk who is not a graduate at the time of entering into articles shall pass the legal history examination, the intermediate law examination, and the final examination, and may present himself for examination as follows :—

Legal History Examination.—6 months after date of articles.

Intermediate Law.—6 months after first presenting himself for the legal history examination.

Section 1.—9 months after first presenting himself for the intermediate law examination.

Section 2.—9 months after first presenting himself for section 1.

Section 3.—9 months after first presenting himself for section 2.

Section 4.—9 months after first presenting himself for section 3.

Under the old Rules a clerk who took the degree of B.A. during his articles was allowed to dispense with the history examination: *Ex parte Fraser*, 3 W.N. 56; but the Rules are now different.

453. Any articulated clerk who resides more than 100 miles from Sydney may elect—

- (a) if a graduate, to take his examinations in sections 1, 2, and 3 together;
- (b) if not a graduate, to take his examinations in legal history and intermediate law together, sections 1 and 2 together, and, subsequently, in sections 3 and 4 together.

Provided that he shall not proceed to any such combined examination until the time fixed by the preceding rules for the latest section in such examination.

454. The following persons, viz. :—

- (a) any person included in sub-clause (f) of Rule 428;
- (b) any person included in sub-clause (g) of Rule 428 at the expiration of six months after he has passed the intermediate law examination;
- (c) Any articulated clerk articulated before the 21st September, 1894, at the expiration of twelve months after he has passed the intermediate law examination—

may proceed to examination (i) in all sections of the final examination, or (ii) in sections 1, 2, and 3 of the final examination, and in section 4 after the lapse of six months from passing in sections 1, 2, and 3.

455. Any articulated clerk who proceeds to examination in all sections under the last preceding rule, and fails to pass such examination, shall be entitled to a certificate for the sections in which he passes, provided that he attains the standard of marks required by the Board for sectional subjects. Thereafter he may proceed to re-examination, term after term, in the section or sections in which he has failed, until he has passed in all the sections.

456. Any articulated clerk who fails to pass any examination may from time to time present himself for re-examination in any subsequent term. Provided that when he has failed more than once to pass any examination, or has allowed more than three months to elapse after a failure before presenting himself for re-examination, he shall not after passing such examination be allowed to present himself for any further examination for the period of six months.

RULES 452-456.

Examinations to be passed by non-graduates.
6 Dec., 1900,
R. 4.
17 June, 1902,
R. 1.

Combined examinations for country articulated clerks.
Ibid. R. 11.

Final examination in all subjects.
21 Sept., 1894,
R. 10.
20 Dec., 1895,
R. 1.
7 June, 1898,
9 March, 1900,
R. 6.

Certificates where examinations passed in some sections only.
20 Dec., 1895,
R. 2.

Re-examinations.
18 Dec., 1877,
R. 11.
10 Sep., 1891,
R. 1.
6 Dec., 1900,
R. 5, 6.

RULES**457-466.**Re-examination
in sections 3 or 4.

457. Any articulated clerk who has failed to pass an examination in both subjects of sections 3 or 4, but who has passed with credit in one of such subjects, may, at the discretion of the Board, be allowed to present himself for re-examination in the subject only in which he has failed: Provided that the same fees shall be payable as for a re-examination in both subjects.

Applications
under Rule 428
(g).
9 March, 1900,
R.R. 4, 5.

458. Before any person is admitted to the intermediate law examination under sub-clause (g) of Rule 428, he shall apply to the Judges, through the Secretary, for permission to present himself for examination, and shall lodge, together with such application—

- (a) a certificate from each Solicitor with whom he has been a clerk to show that he is entitled to apply, and that his character and knowledge of his work are such as to render him fit to be admitted as a Solicitor;
- (b) a certificate from the Incorporated Law Institute of New South Wales as to the applicant being a managing clerk;
- (c) certificates from two householders to whom he has been known for at least five years, as to his character and conduct.

Permission in
discretion of
Judges.
Ibid.

459. The giving or withholding of such permission shall be in the absolute discretion of the Judges, and they may in any case require further or other certificates.

Candidates to be
deemed articulated
clerks.
7 June 1898.
9 March, 1900,
R. 2.

460. Every person required by these rules to pass any examination shall, for the purpose of such examination, as regards notices, payment of fees, and otherwise, be deemed to be an articulated clerk.

Examinations
held before lapse
of prescribed
time.
21 Sept., 1894.
R. 7.

461. An articulated clerk may proceed to any examination at any time not exceeding twenty-one days before the earliest date fixed by these Rules for such examination.

Notice of
intention to
proceed to
examination.
18 Dec., 1877,
RR. 23, 24.

462. Every articulated clerk desirous of proceeding to any examination under these rules shall give notice to the Secretary:—

- (a) in the case of a legal history or intermediate law examination, before the commencement of the term in which such examination is to be held;
- (b) in the case of a final examination, one month at least before such examination.

*Certificates.*Legal History
examination.
17 June, 1902.
R. 8.

463. An articulated clerk who has passed the legal history examination shall be entitled to a certificate in the Form No. 26 contained in the First Schedule.

Intermediate
law examina-
tion.
17 May, 1899,
R. 1.

464. An articulated clerk who has passed the intermediate law examination shall be entitled to a certificate in the Form No. 27 contained in the First Schedule.

Sections of final
examination.
Ibid., R. 2.

465. An articulated clerk who has passed the final examination in any one of its sections shall be entitled to a certificate in the Form No. 28 contained in the First Schedule.

Final examina-
tion.
Ibid., R. 2.

466. An articulated clerk who has passed the final examination in all subjects, but has not complied with all the requirements of the rules, shall be entitled to a certificate in the Form No. 29 contained in the First Schedule.

467. An articled clerk who has passed all the examinations, and who has complied with all the requirements of the Rules, and whose articles have expired, shall be entitled to a certificate in the Form No. 30 contained in the First Schedule.

RULES 467-476.

All examinations and other requirements.
17 May, 1899, R. 4.

468. Every such certificate shall be signed by the President of the Board, or in his absence by one of the senior members of the Board, and countersigned by the Secretary.

Signature to certificates.
Ibid., R. 5.

469. All certificates of having passed an examination, or copies thereof, must be filed within one month after the same have been received.

Certificates to be filed.
18 Dec., 1877, R. 27.

Fees.

470. Every person desirous of presenting himself for the matriculation examination of the University of Sydney under subsection (a) of Rule 436 shall give notice thereof to the Secretary and pay to him a fee of five pounds not less than nine days before the day appointed for such examination.

Matriculation examination.
10 Aug., 1890.

471. Every person not having paid such fee to the Secretary, but having passed an examination under subsection (b) of the said rule, and desiring to obtain a certificate under subsection (b), shall give notice thereof to the Secretary, and pay to him a fee of five pounds.

Certificate, where equivalent examination already passed.
Ibid.

472. The fees paid under the last two preceding rules shall be paid by the Secretary to the Registrar of the University.

Fees to be paid to Registrar of University.
Ibid.

473. The fees for examinations in legal history and law shall be as follows:—

Legal history examination or re-examination : Two pounds.

Intermediate law examination : Five pounds.

Intermediate law re-examination : Two pounds.

Final examination or re-examination, each section : Two pounds ten shillings.

Final examination in all sections : Ten pounds.

Re-examination in all sections of final examination : Five pounds.

Legal History and Law examinations.
13 Nov., 1888, R. 2.
21 Sept., 1894, R. 2.
11 Dec., 1896, R. 2.
17 June, 1902, R. 2.

474. Every articled clerk at the time of giving notice of intention to proceed to any such examination shall pay the fee for the same to the Secretary. The Secretary shall pay all such fees to the examiners in such manner as the Board shall direct.

Payment of fees.
13 Nov., 1888, R. 2.
21 Sept., 1894, R. 2.
17 June, 1902, R. 2.

475. Every articled clerk, at the time of giving such notice, or any notice under Rule 470 or 471, shall, in addition to the fees prescribed by those rules, pay to the Secretary a fee of half a guinea; or in the case of a notice of intention to proceed to examination or re-examination in all sections of the final examination, a fee of one guinea. Such fee shall be retained by the Secretary.

Fees to Secretary.
26 Sept., 1888, RR. 2, 3.
21 Sept., 1894, R. 2.

Admission.

476. No person shall be admitted as a Solicitor except on the last day of term.

Admissions on last day of term only.
18 Dec., 1877, R. 26.

RULES**477-482.**

Notice of application.
18 Dec., 1877,
RR. 24, 26.
10 Sept., 1891,
R. 2.

477. Every person intending to apply for admission as a Solicitor, whether previously admitted elsewhere or not, shall, before the commencement of the term in which he so applies, give notice to the Secretary of his intended application, stating his name and place of residence, and except in the case of persons so admitted elsewhere, his places of residence and service for the last two years, and cause a copy of such notice, written in legible character, to be affixed in the office of the Court, and in the vestibule of the Court-house. Such notice may be given by an articled clerk, although his articles do not expire till after the commencement of the term.

Notice to be advertised.
18 Dec., 1877,
R. 26.

478. Every such person shall also cause notice of his intended application to be three several times during such term published in each of two Sydney daily newspapers.

Twice in one paper and once in another was not sufficient: *Ex parte Dwyer*, 3 W.N. 139.

Answers, &c., to be filed.
Ibid., R. 27.
10 Sept., 1891,
R. 2.

479. Every person applying for admission under sub-clauses (c), (d) or (e) of Rule 428, shall also, not less than seven days before the last day of such term, file —

- (a) answers to the several questions in Forms Nos. 31, 32 and 33, contained in the First Schedule, signed respectively by the applicant, by each Solicitor with whom he has served his clerkship, and by two respectable householders to whom he is personally known;
- (b) a certificate in form No. 34 contained in the First Schedule, signed by each such Solicitor;
- (c) the assignment of his articles, if the same have been assigned within one month then next preceding.

Where the clerk filed his answers and certificates four days before the last day of term and could not show any excuse, the Court refused to relax the Rule: *Ex parte Holt*, 18 W.N. 114.

Power of Board to dispense with compliance.
18 Dec., 1877,
R. 28.

480. If the applicant shows sufficient cause, to the satisfaction of the Board, why the last preceding Rule cannot be fully complied with, the Board, upon sufficient proof of the same, may dispense, as they think fit and reasonable, with compliance with any part of such rule.

See preceding Rule.

Affidavit of compliance with conditions, &c.
Ibid., R. 24.

481. Every person shall also, before being admitted, file an affidavit in the Form No. 35 contained in the First Schedule when he has been previously admitted elsewhere, and in the Form No. 36 contained in the said Schedule when he has not been previously admitted elsewhere.

Board may require further proof.
Ibid., R. 29.

482. Every person applying for admission shall also, if required—

- (a) sign and file answers to such other written or printed questions as the Board may propose touching his service and conduct; and
- (b) attend the Board for the purpose of giving further explanations touching the same; and
- (c) procure the attendance of any Solicitor with whom he has served his clerkship, and of such other person as the Board

may direct, to answer either personally or in writing any questions touching such service or conduct, or prove to the satisfaction of the Board his inability to procure the same.

**RULES
482-490**

483. Every person applying for admission under sub-clause (h) of Rule 428 shall file an affidavit in Form No. 37 contained in the First Schedule. The last preceding seven Rules shall not apply to any such person.

Barriers applying for admission.

484. Every person giving notice of his intention to apply for admission under sub-clause (a) or (b) of Rule 428 shall, at the same time, lodge with the Secretary the certificate of his previous admission, and also file an affidavit in the Form No. 38 contained in the First Schedule.

Affidavit by applicant previously admitted elsewhere. 18 Dec., 1877, R. 25.

By R. 477 such notice must be given before the first day of the term when application is to be made, and the affidavit abovementioned must be filed at the same time; therefore the applicant must at that time have resided three months in the colony: *Ex parte Ryan*, 3 W.N. 106.

Application to dispense with the statement in the affidavit in reference to the certificate (the applicant having left England before his certificate issued) was granted on condition that certificate was filed before the end of term: *In re Wightman*, 2 W.N. 28.

485. The rule for the admission of such person shall be drawn up on reading such affidavit, and shall be conditional for twelve months, unless the Court sees cause to the contrary.

Admission to be conditional. *Ibid.*

486. At the time of filing such affidavit, such person shall pay the sum of forty guineas to the Secretary, who shall in due course hand the same to the Treasurer of the Incorporated Law Institute of New South Wales, to be appropriated towards the Law Library Fund of that Institute. Provided that if in any case the Court refuses to grant conditional admission, the said sum shall be refunded to the applicant.

Fee on conditional admission. 26 Sept., 1888, R. 1.

487. Every person so conditionally admitted shall, three months before the expiration of such twelve months, serve notices on the Secretary, and on the Secretary of the Incorporated Law Institute, of his intention to apply to the Court to have such conditional admission confirmed.

Notice of application to confirm admission. 13 Dec., 1886.

The motion to confirm the conditional admission (or, if the last day of the term falls beyond the twelve months, the motion to extend the time) must be made before the expiration of the twelve months: *Ex parte Mainwaring*, 4 W.N. 153.

488. At the time of serving such notice on the Secretary, he shall file an affidavit in the Form No. 39 contained in the First Schedule.

Affidavit to be filed. *Ibid.*

489. If such conditional admission is not confirmed, and the rule drawn up accordingly at the expiration of such twelve months, the said conditional admission shall cease to operate after that time, unless the Court sees cause to the contrary.

Conditional admission to lapse if not confirmed. *Ibid.*

490. Every person giving notice of his intention to apply for conditional admission, or for the confirmation of a conditional admission, shall at the same time pay a fee of one guinea to the Secretary, which shall be retained by him.

Fee to Secretary. 26 Sept., 1888, R. 1.

RULES**491-494.**

Court in certain cases may relax Rules.
16 August, 1892.

491. If any articulated clerk, articulated in New South Wales, fails in the strict observance of the requirements of these Rules, the Court, notwithstanding anything contained in these Rules, if satisfied that such failure was occasioned by accident, mistake, or other sufficient cause, may make such order as in the opinion of the Court the circumstances of the case require.

See cases cited under preceding Rules.

Notice to be given of all applications.
28 July, 1897.

492. No application by any articulated clerk shall be entertained by the Court unless such clerk has previously given to the Secretary a day's notice of such application.

Forms.

Application for prohibition, &c.

493. In applications for prohibition, mandamus, quo warranto, and the like, all rules, orders, summonses, and affidavits shall be sufficiently intitled if intitled as in Form No. 25, contained in the First Schedule.

Forms in Schedule.

494. The forms contained in the First Schedule, and in cases where no form is prescribed the forms now in use, may be used with such alterations as the circumstances of the case may render necessary; but any variance therefrom, not being in matter of substance, shall not affect the validity or regularity of the proceedings.

M. H. STEPHEN, A.C.J.

WM. OWEN, J.

G. B. SIMPSON, J.

H. E. COHEN, J.

ARCHD. H. SIMPSON, C.J. in Eq.

W. GREGORY WALKER, J.

ROBERT D. PRING, J.

FIRST SCHEDULE.

FORMS.

No. 1.

Præcipe for Writ of Summons.

In the Supreme Court
of New South Wales.

WRIT of summons for [name and residence of plaintiff] against [name and residence of defendant, as in writ.] Rule 28.

Appearance [number of days or months] after service.

*Amount sought to be recovered [the amount claimed].

Dated this day of 19 .

J.N.,
Plaintiff's attorney [or plaintiff in person],
[Address].

*NOTE.—Where the writ is in ejectment, the amount sought to be recovered will be omitted, and the following be substituted :—

Premises sought to be recovered : [State the county or place, as in the writ].

No. 2.

Notice to Admit.

In the Supreme Court
of New South Wales. Between A.B., plaintiff, and C.D., defendant.

TAKE notice that the plaintiff [or defendant] in this cause proposes to adduce in evidence the several documents hereunder specified, and that the same may be inspected by the defendant [or plaintiff] his attorney or agent at on , between the hours of ; and the defendant [or plaintiff] is hereby required, within forty-eight hours from the last-mentioned hour, to admit that such of the said documents as are specified to be originals were respectively written, signed, or executed, as they purport respectively to have been ; that such as are specified as copies, are true copies ; and that such documents as are stated to have been served, sent, or delivered, were so served, sent, or delivered respectively, saving all just exceptions to the admissibility of all such documents as evidence in this cause. Rule 135.

Dated this day of 19 .

J.N.,
Plaintiffs [or defendant's] attorney [or agent].

To E.F., defendant's [or plaintiff's] attorney [or agent].

[Here describe the documents, the manner of doing which may be as follows :]

Originals.

Description of the Documents.	Date.
Deed of covenant between A.B. and C.D., 1st part ; and E.F., 2nd part	1st Jan., 1848
Indenture of lease from A.B. to C.D.	1st Feb., 1848
Indenture of release between A.B., C.D., 1st part, &c.	2nd Feb., 1848
Letter, defendant to plaintiff... ..	1st Mar., 1898
Policy of insurance on goods by ship "Isabella," on voyage from Oporto to London... ..	3rd Dec., 1897
Memorandum of Agreement between C.D., captain of said ship, and E.F.	1st Jan., 1898
Bill of exchange for £100 at three months, drawn by A.B. on and accepted by C.D., indorsed by E.F. and G.H.	1st May, 1899

RULES
Sch. 1.

Copies.

Description of the Documents.	Date.	Original or duplicate: served, sent, or delivered; when, how, and by whom.
Register of baptism of A.B., in the parish of X	1st Jan., 1808	Sent by General Post, 2nd Feb., 1900. Served 2nd March, 1902, on defendant's attorney, by E.F. of—
Letter—plaintiff to defendant	1st Feb., 1900	
Notice to produce papers	1st Mar., 1902	
Record of a judgment of the Supreme Court in an action, J.S. v J.N.	3rd Mar., 1896	
Letters patent of King Charles II in the Rolls Chapel	1st Jan., 1680	

No. 3.

Satisfaction Piece.

In the Supreme Court of
New South Wales.

Monday, the day of A.D. 19 .

Rule 175.

to wit.—Satisfaction is acknowledged between A.B., plaintiff, and C.D., defendant, in an action for : And I do hereby expressly nominate and appoint J.N., solicitor, to witness and attest my execution of this acknowledgment of satisfaction.

Judgment entered on the day of in the year of our Lord, 19 , Roll No.

Signed by the said A.B. in the presence of me, J.N., of
one of the solicitors of this Honorable
Court. And I hereby declare myself to be
attorney for and on behalf of the said A.B.
expressly named by him and attending at his
request to inform him of the nature and effect
of this acknowledgment of satisfaction (which
I accordingly did before the same was signed by
him) And I also declare that I subscribe my
name hereto as such attorney.

[Signature].

the above-named plaintiff.

[Date].

No. 4.

Præcipe for Capias.

Between A.B., plaintiff, and C.D. and E.F., defendants.

Rule 217.

PRÆCIPÉ for writ of capias in this action, against the above-named C.D., now on [residence, or supposed residence], returnable in thirty days; or, if executed, in eight days after arrest.—Bail by affidavit for £ by order of His Honor Mr. Justice

Dated at Sydney, this day of 19 .

J.N.,

Plaintiff's attorney [or Plaintiff in person].

NOTE.—Where delivered to a Commissioner, or to a Judge's Clerk on Circuit, the following must be added:—Mr. —, of — street, in Sydney, is my agent of whom all papers in this cause may be served.

No. 5.

RULES
Sch. 1.*Writ of Capias ad respondendum.*

EDWARD VII, by the Grace of God of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas, King, Defender of the Faith, &c.

Rule 217.

To our Sheriff of New South Wales—

Greeting :

WE command you that you take C.D., of [residence, or supposed residence, as in *præcipe*], and him safely keep, until he shall have given you bail, or made deposit of the sum hereon indorsed, with ten pounds for costs, as by law is required, in the action now pending in our Supreme Court of New South Wales at the suit of A.B. against the said C.D., sued with E.F., or until the said C.D. shall by other lawful means be discharged from your custody. And we direct you, on the execution of this writ, to deliver a copy hereof to the defendant, with a copy of the indorsement hereon, and of the notice hereunder written. Lastly, we command you to return this writ into our said Court, within eight days after execution thereof, together with the date of its execution, or at the expiration of thirty days from this date, if then unexecuted, with your reason for not having executed the same.

WITNESS the Honorable Sir Frederick Darley, Knight Grand Cross of the Most Distinguished Order of Saint Michael and Saint George, Chief Justice of our said Court, at Sydney, this
day of in the year of our reign, and A.D. 19 .

(Signature of a Judge, or of the Prothonotary, or Clerk acting for him; or, if at Newcastle, of the Commissioner there.)

Notice to be subjoined.

Mr. C.D.

TAKE notice that after giving bail to the Sheriff on your arrest you should within eight days after such arrest cause special bail to this action to be put in for you, according to the practice of the Court.—In default of your so doing, the plaintiff may proceed on the bond given by you.

J.N.,
Plaintiff's attorney.

(Indorsement on the writ.)

Bail for [amount, in words at length], by Order of His Honor [Judge making the Order] under date the day of 19 .

J.N.,
Plaintiff's attorney.
Street, [or Place], Sydney.

No. 6.

Affidavit of Justification by Bail.

In the Supreme Court
of New South Wales, | Between A.B., plaintiff, and C.D. and E.F. defendants.

On the day of in the year one thousand nine hundred and Rule 243
G.H. of [residence, and quality, trade, or calling], and J.H., of [residence, and quality, &c.], being duly sworn, severally make oath and say as follows:—We, the said G.H. and J.K., are bail [or are about to become bail] jointly and severally in the sum of [amount] in this action, for the above-named C.D.—I, the said G.H., declare that I reside at number in street aforesaid [or otherwise particularly describe the residence], and I swear that I am worth and have available property to the amount aforesaid and upwards in my own right, and to my own use, over and above the amount of all my debts, or any just claims on me, and over and above every sum for which I am now bail [or, and I am not bail for any other person] in any action or proceeding, civil or criminal.—And I further declare that such property consists partly of a freehold [or leasehold] farm of acres, at [describe where] and partly of furniture in my said residence, and partly of stock-in-trade [or sheep and cattle] in my business of a [merchant, farmer, &c.], and partly of [inserting any other particulars such as moneys lent, or bank stock, &c.] I, the said J.K., declare that I reside [insert the like particulars, according to the circumstances applicable to him].

Sworn, &c. [Jurat
in usual form]
C.L.P.A. 29

G.H.
J.K.

RULES**Sch. 1.**

Rule 272.

No. 7.

Writ of Foreign Attachment.

EDWARD VII., by the Grace of God of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas King, Defender of the Faith, &c.

To our Sheriff of New South Wales—

Greeting :

WHEREAS A. B. hath lately in the Supreme Court of New South Wales commenced an action at law against C. D. [or against C. D. and E. F.], and the person entrusted with the service of the writ of summons in the said action upon the said C. D. has made an indorsement thereon to the effect that he has made diligent search for the said C. D., and has been unable to find him, and the said A. B. has caused to be filed in the said Court the affidavit required in that behalf by the Common Law Procedure Act, 1899: Now we command you that you attach in the hands of G. H. [or G. H., R. M., and J. K. respectively] all the lands, hereditaments, moneys, securities for money, chattels, bills, bonds, and other property belonging to the said C. D. or to or in which the said C. D. is legally or equitably entitled or otherwise beneficially interested, and which are or is in the custody or under the control of the said G. H. [or G. H., R. M., and J. K. respectively] at the time of your serving him [or them] with this writ, and also all and every the sum and sums of money in which the said G. H. is [or the said G. H., R. M., and J. K., or either of them are or is] indebted to the said C. D. at the time of such service. And we further command you that you summon the said G. H. [or the said G. H., R. M., and J. K., and each of them] that he [or they] appear before the said Court at Sydney on the day of _____ next [or instant] to be examined touching the premises, and to do and receive what the Court shall consider in this behalf, and have you then there this writ.

WITNESS the Honorable Sir Frederick Darley, Knight Grand Cross of the Most Distinguished Order of Saint Michael and Saint George, Chief Justice of our said Court, at Sydney, this _____ day of _____ in the _____ year of our reign, and A. D. 19 ____.

For the Prothonotary,

Clerk of the Supreme Court.

No. 8.

Notice to Garnishees.

(To be indorsed on the writ).

Rule 272.

TAKE notice that from the time of your being served with this writ, all the hereditaments, moneys, securities for money, chattels, bills, bonds, and other property of whatsoever nature, in your custody or under your control, belonging to the within-named C. D., or to or in which he is legally or equitably entitled or otherwise beneficially interested, and whether solely or jointly with any other person, and all debts of every kind due by you to the said C. D., although the same or part thereof may be payable only at a future day, are to the extent of the right, title, and interest of the said C. D. therein attached in your hands, and (subject to any *bond fide* prior claims or liens thereon), are liable to the satisfaction of the debt due to the within-named A. B. in this action. And if you shall, before this attachment be dissolved, sell or otherwise dispose of or part with any such property, or pay over any such debt or any part thereof, without leave of the Court, you will be liable to pay such damages to the said A. B. as the said Court or a Judge thereof shall think fit to order.

J. N.,

Plaintiff's attorney.

To G. H. [or to G. H., R. M., and J. K. severally].

MEMORANDUM.—You are required to attend on this writ before the Judge sitting in Chambers, in King-street, Sydney, on the day within specified, at o'clock in the forenoon.

No. 9.

Notice of the Writ.

In the Supreme Court
of New South Wales. } Between A.B., plaintiff, and C.D., defendant.

WHEREAS an action has been commenced in this Court at the suit of the above- named A.B. against the above-named C.D. [or C.D. and E.F.] to recover [state shortly the cause of action in substance, and the amount sworn to, if for a sum certain], and it being alleged that the said C.D. does not reside within the jurisdiction of this Court, a writ of foreign attachment has been issued returnable on the day of , wherein G.H. of , is garnishee, [or G.H. of , R.M. of , and J.K. of , are garnishees], notice is hereby given thereof; and if at any time before final judgment in this action, the said C.D. or any person on his behalf will give the security and notice, and file the appearance and plea, required in that behalf by the Common Law Procedure Act, 1899, the attachment may be dissolved.

Dated this day of , 19 .

J.N.,
Plaintiff's attorney,
[or A.B., plaintiff.]

No. 10.

Bond.

KNOW all men by these presents that we, A.B. of , N.O. of , and P.Q. of , are and each of us is jointly and severally bound unto C.D., late of , in the penal sum of [£c., as in an ordinary bond].

WHEREAS an action at law has lately been commenced in the Supreme Court of New South Wales, at the suit of the above bounden A.B. against the above-named C.D. [or C.D. and another] and a writ of foreign attachment has, on the application of the said A.B., been issued therein, and whereas the said A.B. being about to proceed in the said action, it is necessary for him to give the security required by the Common Law Procedure Act, 1899, in that behalf, and the above bounden N.O. and P.Q. have agreed to become his sureties, now the condition of this obligation is that if the said A.B., his executors or administrators shall repay or cause to be repaid to the said C.D., his executors or administrators, all and every the sums or sum of money which he the said A.B. shall receive or recover in the said action, in case the judgment obtained therein shall be hereinafter reversed, vacated, or altered, and also shall pay or cause to be paid all and every the sums and sum of money, damages, costs, and charges which by the said Court shall at any time hereafter be adjudged or ordered to be paid by the said A.B., his executors or administrators, to the said C.D., his executors or administrators, by reason of or in any manner relating to the said action and the said attachment or either of them, or any proceedings taken or to be taken in or under the same respectively, or under any execution or executions issued in the said action, then this obligation shall be void, but otherwise it is to remain in full force.

[Where the plaintiff is absent, and the bond is entered into by a third party for him, recite those facts, and alter the above form accordingly, to correspond therewith.]

No. 11.

Notice to absent Co-partners.

In the Supreme Court
of New South Wales. }

Between A.B., plaintiff, and C.D. and E.F., defendants.

WHEREAS an action has been commenced in this Court at the suit of the above-named A.B. against the above-named C.D. and E.F. as co-partners carrying on business under the style or firm of , and no appearance has been entered for the said C.D. in the said action, and he is alleged to be absent from the jurisdiction, notice is hereby given that unless the said C.D. or some person on his behalf shall enter an appearance for the said C.D. to the said

RULES
Sch. 1.

action, on or before the _____ day of _____, the said A.B. will cause such appearance to be entered for him, in pursuance of the provisions of the Common Law Procedure Act, 1899, in that behalf, and will proceed in the said action as if the said C.D. resided in Sydney, and had appeared in person to the same.

Dated this _____ day of _____ 19 _____ J.N.,
Plaintiff's attorney.
[or A.B., plaintiff.]

No. 12.

Notice of Mining Appeal.

Rule 378.

In the matter of the appeal pending in the District Court for sitting as a Mining Appeal Court, under the provisions of the Mining Act, 1874, in which appeal _____ is appellant, and _____ is respondent.

To [District Court Judge and opposite party or his Attorney].

I hereby give you notice that it is my intention to appeal to the Supreme Court against the determination and direction made herein on the day of _____ A.D., 19 _____. [Here set forth the determination or direction appealed from.]

Dated this _____ day of _____ A.D., 19 _____.
[Signed by the party appealing or his attorney.]

No. 13.

Issue.

In the Supreme Court
of New South Wales.

The _____ day of _____ in the year of our Lord 19 _____.
[date of declaration].

(*The Venue.*)—A.B. by J.N. his attorney [or in person, as the case may be, and as in the declaration] sues P.A., who has been summoned to answer the said A.B., by virtue of a writ issued on the _____ day of _____ in the year of our Lord _____ [the date of the first writ], out of this honourable Court [if the writ was specially indorsed, add :—which said writ was specially indorsed as follows :—copy special indorsement] for [dec. Copy the declaration from these words to the end, and all the pleadings, with their dates, writing each plea or pleading in a separate paragraph, and numbering the same as in the pleading delivered, and conclude thus :] Therefore let a jury come, &c.

No. 14.

Postea on a Verdict for Plaintiff on all the Issues where the Defendant appears at the Trial.

AFTERWARDS, on the _____ day of _____ A.D. 19 _____, at the Supreme Court House, Sydney, before the Honorable _____ a Judge of our said Court, come the parties within-mentioned by their respective attorneys within-mentioned, and a jury of the district, being summoned, also come, who, being sworn to try the matters in question between the said parties upon their oath, say that [dec. state the affirmative or negative of the issue as it is found for the plaintiff, and in the terms adopted in the pleading]. [If there be several issues joined and tried then say as to the first issue within joined upon their oath say that (dec. state the affirmative or negative of the issue as found for plaintiff), and as to the second issue within joined, the jury aforesaid upon their oath say that (dec. so proceed to state the finding of the jury on all the issues).] [Conclude with an assessment of the damages, thus :] And they assess the damages of the plaintiff on occasion of the premises within complained of by him, over and above his costs of suit, to £ _____. Therefore, &c.

No. 15.

RULES
Sch. 1.*Judgment for Plaintiff on a Verdict.*

[Copy the issues and then proceed thus:] Afterwards, on the day of _____ in the year of our Lord _____ [day of signing final judgment] come the parties aforesaid, by their respective attorneys aforesaid [or as the case may be, if they have not appeared by attorneys], and the Honorable _____, a Judge of our said Court, before whom the said issue was [or issues were] tried, hath sent hither his record had before him in these words: Afterwards [etc. copy the postea]. Therefore it is considered that the plaintiff do recover against the defendant the said moneys by the jurors aforesaid in form aforesaid assessed [or if the action be in debt and the jury do not assess the debt, but only the damages and forty shillings costs, do recover against the defendant the said debt of _____, and the moneys by the jurors aforesaid in form aforesaid assessed]; and also £ _____ for his costs of suit by the Court here adjudged to the plaintiff, which said moneys and costs [or debt, damages and costs] in the whole amount to £ _____.

[In the margin of the roll, opposite the words "Therefore it is considered," write Judgment signed the _____ day of _____ A.D. 19 _____ stating the day of signing the judgment.]

No. 16.

Writ of Fieri Facias on a Judgment for the Plaintiff.

EDWARD VII, by the Grace of God of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas King, Defender of the Faith, &c.

To our Sheriff of New South Wales—

Greeting :

WE command you that of the goods and chattels, money and securities for money, lands, tenements, and hereditaments, equities of redemption, and equitable interests of and belonging to C.D., you cause to be made £ _____ [the amount of all the moneys recovered by the judgment], which A.B. lately in our Supreme Court of New South Wales recovered against him, whereof the said C.D. is convicted, together with interest upon the said sum at the rate of four pounds per centum per annum from the _____ day of _____, one thousand nine hundred and _____, on which day the judgment aforesaid was entered up, and have that money, together with such interest as aforesaid, before us in our Supreme Court at Sydney immediately after the execution hereof, to be rendered to the said A.B.; and that you do all such things as you are authorised and required to do in this behalf; and in what manner you have executed this our writ make appear to us at Sydney immediately after the execution hereof; and have you there then this writ.

—WITNESS the Honorable Sir Frederick Darley, Knight Grand Cross of the Most Distinguished Order of Saint Michael and Saint George, Chief Justice of our said Court, at Sydney, this _____ day of _____, in the _____ year of our reign, and A.D. 19 _____.

For the Prothonotary,

Clerk of the Supreme Court.

Debt	...	...	...	...	...	...	£
Interest	...	...	...	...	...	...	...
Taxed Costs	...	...	...	...	...	...	...
Writ of Fieri Facias	...	...	...	...	...	...	...

Levy £

Besides Sheriff's fees, poundage, and other expenses, and interest on £ _____ at 4 per cent. per annum from the day of _____ A.D. 19 _____, until payment.

RULES
Sch. 1.

No. 17.

Writ of Fieri Facias on a Judgment for the Defendant.

EDWARD VII, by the Grace of God of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas King, Defender of the Faith, &c.

To our Sheriff of New South Wales—

Greeting :

WE command you that of the goods and chattels, money and securities for money, lands, tenements, and hereditaments, equities of redemption, and equitable interests, of and belonging to A.B. you cause to be made £ , which lately in our Supreme Court of New South Wales were awarded to C.D. for the costs of defence in an action lately prosecuted in our said Court by the said A.B. against the said C.D., whereof the said A.B. is convicted, together with interest upon the said sum, at the rate of four pounds per centum per annum, from the day of , one thousand nine hundred and , on which day the judgment aforesaid was entered up, and have that money, together with such interest as aforesaid, before us in our Supreme Court at Sydney immediately after the execution hereof, to be rendered to the said C.D. ; and that you do all such things as you are authorised and required to do in this behalf ; and in what manner you have executed this our writ make appear to us at Sydney immediately after the execution hereof, and have you there then this writ.

WITNESS the Honorable Sir Frederick Darley, Knight Grand Cross of the Most Distinguished Order of Saint Michael and Saint George, Chief Justice of our said Court, at Sydney, this day of in the year of our reign, and A.D. 19 .

For the Prothonotary,

Clerk of the Supreme Court.

Taxed Costs	...	..	...	..	...	£
Interest	...	...	...	...	...	...
Writ of <i>Fieri Facias</i>	...	...	...	...	...	...

Levy £

Besides Sheriff's fees, poundage, and other expenses, and interest on £ at 4 per cent. per annum from the day of , A.D. 19 , until payment.

No. 18.

Writ of Fieri Facias on a Rule for payment of Money and Costs.

EDWARD VII, by the Grace of God of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas King, Defender of the Faith, &c.

To our Sheriff of New South Wales,—

Greeting :

WE command you that of the goods and chattels, money and securities for money, lands, tenements, and hereditaments, equities of redemption, and equitable interests, of and belonging to C.D. you cause to be made £ , which lately in our Supreme Court of New South Wales, by a Rule of our said Court dated the day of , one thousand nine hundred and , were ordered to be paid by the said C.D. to A.B., together with certain costs in the said Rule mentioned, which said costs have been taxed and allowed by our said Court at £ , and that you further cause to be made interest upon the said sums of £ and £ at the rate of four pounds per centum per annum, from the said day of , one thousand nine hundred and , and have those moneys, together with such interest as aforesaid, before us in our Supreme Court at Sydney immediately after the execution hereof, to be rendered to the said A.B., and that you do all such things as you are authorised and required to do in this behalf ; and in what manner you have executed this our writ make appear to us at Sydney immediately after the execution hereof ; and have you there then this writ.

WITNESS the Honorable Sir Frederick Darley, Knight Grand Cross of the Most Distinguished Order of Saint Michael and Saint George, Chief Justice of our said Court, at Sydney, this day of in the year of our reign, and A.D. 19 .

RULES
Sch. 1.

For the Prothonotary,

Clerk of the Supreme Court.

Ordered to be paid by Rule	...	...	...	£
Taxed Costs	...	...	...	...
Writ of <i>Fieri Facias</i>	...	...	...	...

Levy £

Besides Sheriff's fees, poundage, and other expenses, and interest
on £ at 4 per cent. per annum from the day of
 A.D. 19 , until payment.

No. 19.

Writ of Fieri Facias on a Rule for Payment of Money.

EDWARD VII, by the Grace of God of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas King, Defender of the Faith, &c.

To our Sheriff of New South Wales,—

Greeting :

WE command you that of the goods and chattels, money and securities for money, lands, tenements, and hereditaments, equities of redemption, and equitable interests, of and belonging to C.D. you cause to be made £ , which lately in our Supreme Court of New South Wales by a Rule of our said Court dated the day of , one thousand nine hundred and , were ordered to be paid by the said C.D. to A.B., and that you further cause to be made interest upon the said sum at the rate of four pounds per centum per annum from the said day of , one thousand nine hundred and , and have that money, together with such interest as aforesaid, before us in our Supreme Court at Sydney immediately after the execution hereof, to be rendered to the said A.B.; and that you do all such things as you are authorised and required to do in this behalf; and in what manner you have executed this our writ make appear to us at Sydney immediately after the execution hereof; and have you there then this writ.

WITNESS the Honorable Sir Frederick Darley, Knight Grand Cross of the Most Distinguished Order of Saint Michael and Saint George, Chief Justice of our said Court, at Sydney, this day of in the year of our reign, and A.D. 19 .

For the Prothonotary,

Clerk of the Supreme Court.

Ordered to be paid by Rule	...	...	...	£
Writ of <i>Fieri Facias</i>	...	...	...	...

Levy £

Besides Sheriff's Fees, poundage, and other expenses,
and interest on £ at 4 per cent. per annum from
the day of A.D. 19 , until payment.

RULES **Sch. 1.**

No. 20.

Writ of Fieri Facias on a Rule for Payment of Costs only.

EDWARD VII, by the Grace of God of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas King, Defender of the Faith, &c.

To our Sheriff of New South Wales—

Greeting :

WE command you that of the goods and chattels, money and securities for money, lands, tenements, and hereditaments, equities of redemption, and equitable interests of and belonging to C.D., you cause to be made £ for certain costs, which lately in our Supreme Court of New South Wales by a rule of our said Court, dated the day of , one thousand nine hundred and , were ordered to be paid by the said C.D. to A.B., which said costs have been taxed and allowed by our said Court at the said sum ; and that you further cause to be made interest on the said sum at the rate of four pounds per centum per annum from the day of , one thousand nine hundred and , and have that money, together with such interest as aforesaid, before us in our Supreme Court at Sydney immediately after the execution thereof to be rendered to the said A.B. ; and that you do all such things as you are authorised and required to do in this behalf ; and in what manner you have executed this our writ make appear to us at Sydney immediately after the execution hereof ; and have you there then this writ.

WITNESS the Honorable Sir Frederick Darley, Knight Grand Cross of the Most Distinguished Order of Saint Michael and Saint George, Chief Justice of our said Court, at Sydney, this day of in the year of our reign, and A.D. 19 .

For the Prothonotary,

Clerk of the Supreme Court.

Taxed costs	...	...	...	...	£
Writ of <i>Fieri Facias</i>	...	...	...	...	£
Levy	...	...	...	...	£
Besides Sheriff's fees, poundage, and other expenses, and interest on £	at 4 per cent. per annum				
from the	day of				A.D. 19 ,
until payment.					

No. 21.

Writ of Capias ad Satisfaciendum on a Judgment for Plaintiff.

EDWARD VII, by the Grace of God of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas King, Defender of the Faith, &c.

To our Sheriff of New South Wales—

Greeting :

WE command you that you take C.D., and him safely keep so that you may have his body before us in our Supreme Court at Sydney immediately after the execution hereof, to satisfy A.B. £ [*the amount of all the moneys recovered by the judgment*] which the said A.B. lately in our said Court recovered against the said C.D., whereof the said C.D. is convicted, together with interest upon the said sum at the rate of four pounds per centum per annum from the day of , one thousand nine hundred and , on which day the judgment aforesaid was entered up ; and have you there then this writ.

WITNESS the Honorable Sir Frederick Darley, Knight Grand Cross of the Most Distinguished Order of Saint Michael and Saint George, Chief Justice of our said Court, at Sydney, this day of in the year of our reign, and A.D. 19 .

For the Prothonotary,

Clerk of the Supreme Court.

No. 22.

RULES
Sch. 1.*Writ of Habere Facias in Ejectment upon a Judgment by Default.*

EDWARD VII., by the Grace of God of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas King, Defender of the Faith, &c.

To our Sheriff of New South Wales—

Greeting :

WHEREAS A.B. lately in our Supreme Court of New South Wales by the judgment of the said Court recovered possession of *[here describe the property as in the writ of ejectment, or if part only of the land has been recovered describe such part as in the judgment]*, with the appurtenances : Therefore we command you that without delay you cause the said A.B. to have possession of the said lands and premises, with the appurtenances. And in what manner you have executed this our writ make appear to us at Sydney immediately after the execution hereof ; and have you there then this writ.

WITNESS the Honorable Sir Frederick Darley, Knight Grand Cross of the Most Distinguished Order of Saint Michael and Saint George, Chief Justice of our said Court, at Sydney, this day of , in the year of our reign, and A.D. 19 .

For the Prothonotary,

Clerk of the Supreme Court.

No. 23.

Writ of Habere Facias and Fieri Facias for Costs upon a Judgment for Plaintiff in Ejectment where Defendant has appeared.

EDWARD VII., by the Grace of God of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas King, Defender of the Faith, &c.

To our Sheriff of New South Wales—

Greeting :

WHEREAS A.B. lately in our Supreme Court of New South Wales recovered possession of *[here describe the property as in the writ of ejectment, or if part only of the land has been recovered, describe such part as in the judgment]*, with the appurtenances, in an action of ejectment at the suit of the said A.B. against C.D. : Therefore we command you that without delay you cause the said A.B. to have possession of the said lands and premises, with the appurtenances ; and we also command you that of the goods and chattels, money and securities for money, lands, tenements, and hereditaments, equities of redemption, and equitable interests of and belonging to the said C.D. you cause to be made £ which the said A.B. lately in our said Court recovered against the said C.D. for the said A.B.'s costs of the said suit, whereof the said C.D. is convicted, together with interest upon the said sum at the rate of four pounds per centum per annum from the day of one thousand nine hundred and , on which day the judgment aforesaid was entered up, and have that money, together with such interest as aforesaid, before us in our Supreme Court at Sydney immediately after the execution hereof, to be rendered to the said A.B. ; and that you do all such things as you are authorised and required to do in this behalf. And in what manner you have executed this our writ make appear to us at Sydney immediately after the execution hereof ; and have you there then this writ.

WITNESS the Honorable Sir Frederick Darley, Knight Grand Cross of the Most Distinguished Order of Saint Michael and Saint George, Chief Justice of our said Court, at Sydney, this day of in the year of our reign, and A.D. 19 .

For the Prothonotary,

Clerk of the Supreme Court.

RULES
Sch. 1.

Taxed Costs	...	...	...	...	£
Interest	...	...	...	...	...
Writ of <i>Habere Facias</i> and <i>Fieri Facias</i>	...	...	...	...	...

Levy	...	...	...	...	£
Besides Sheriff's fees, poundage, and other expenses,					
and interest on £		at 4 per cent. per annum			
from the	day of			A.D. 19	, until
payment.					

No. 24.

Writ of *Fieri Facias* for Costs on a Judgment for Plaintiff in Ejectment
where Defendant has appeared.

EDWARD VII, by the Grace of God of the United Kingdom of Great Britain
and Ireland and of the British Dominions beyond the Seas King,
Defender of the Faith, &c.

To our Sheriff of New South Wales--
Greeting :

We command you that of the goods and chattels, money and securities for
money, lands, tenements, and hereditaments, equities of redemption, and equitable
interests of and belonging to C. D. you cause to be made £ _____ which A.B.,
lately in our Supreme Court of New South Wales, recovered against him, for the
said A.B.'s costs of suit in an action of ejectment brought by the said A.B. against
the said C.D. in that Court, whereof the said C.D. is convicted, together with
interest upon the said sum at the rate of four pounds per centum per annum
from the _____ day of _____ one thousand nine hundred and
_____, on which day the judgment aforesaid was entered up, and have
that money, together with such interest as aforesaid, before us in our Supreme
Court at Sydney immediately after the execution hereof, to be rendered to the
said A.B. ; and that you do all such things as you are authorised and required to
do in this behalf. And in what manner you have executed this our writ make
appear to us at Sydney immediately after the execution hereof ; and have you there
then this writ.

WITNESS the Honorable Sir Frederick Darley, Knight Grand Cross of the
Most Distinguished Order of Saint Michael and Saint George, Chief
Justice of our said Court, at Sydney, this _____ day of _____
in the _____ year of our reign, and A.D. 19 _____.

For the Prothonotary,
Clerk of the Supreme Court.

Taxed Costs	...	...	...	...	...	£
Interest	...	...	...	...	...	...
Writ of <i>Fieri Facias</i>	...	...	...	...	...	...

Levy	...	...	...	...	...	£
Besides Sheriff's fees, poundage and other expenses,						
and interest on £		at 4 per cent per annum				
from the	day of			A.D. 19	, until	payment.

No. 25.

Title in applications for prohibition, &c.

In the Supreme Court)
of New South Wales. {

Ex parte A.B. [name and address of applicant].

Re C.D. and E.F. [names, additions, and addresses of respondents,
or persons sought to be made respondents].

Prohibition [or as the case may be]

No. 26.

RULES
Sch. 1.

In the Supreme Court }
of New South Wales. }

IN pursuance of the Rules of the Supreme Court of New South Wales, it is hereby Rule 463.
certified that has been duly examined in Legal History at an
Intermediate Examination held on the day of as required by
the said Rules, and that the said has satisfactorily passed the
said Examination.

Dated this day of , A.D. 19 .
President, Board of Examiners.

Countersigned—

Secretary. _____

No. 27.

In the Supreme Court }
of New South Wales. }

IN pursuance of the Rules of the Supreme Court of New South Wales, it is hereby Rule 464.
certified that has been duly examined in the Laws of Real and
Personal Property at an Intermediate Examination held on the day
of as required by the said Rules; and that the said has
satisfactorily passed the said Examination.

Dated this day of A.D. 19 .
President, Board of Examiners.

Countersigned—

Secretary. _____

No. 28.

In the Supreme Court }
of New South Wales. }

IN pursuance of the Rules of the Supreme Court of New South Wales, it is hereby Rule 465.
certified that has been duly examined as required by the said
Rules in Section of the Final Examination; and that the said
has satisfactorily passed the said Section of the said Final Examination.

Dated this day of A.D. 19 .
President, Board of Examiners.

Countersigned—

Secretary. _____

No. 29.

In the Supreme Court }
of New South Wales. }

IN pursuance of the Rules of the Supreme Court of New South Wales, it is Rule 466.
hereby certified that has been duly examined in all the
subjects of the Final Examination as required by the said Rules; and that the
said has satisfactorily passed the said Examination.

Dated this day of A.D. 19 .
President, Board of Examiners.

Countersigned—

Secretary. _____

No. 30.

In the Supreme Court }
of New South Wales. }

IN pursuance of the Rules of the Supreme Court of New South Wales, it is hereby Rule 467.
certified that has complied with all the conditions prescribed, and has
passed all the examinations required by the said Rules; and it is further certified
that the said is fit and capable to act as a Solicitor of the said Court.

Dated this day of A.D. 19 .
President, Board of Examiners.

Countersigned—

Secretary. _____

RULES

Sch. 1.

Rule 479.

No. 31.

Questions to be answered by the Clerk.

1. Where did you board and lodge during the continuance of your articles?
2. During what hours were you required to attend to the business of your master's office?
3. What was your age on the day of the date of your articles?
4. Have you served the whole term of your articles at the office where the Solicitor to whom you were articulated or assigned carried on his business? If not, state the reason.
5. Have you at any time, during the term of your articles, been absent without the permission of such Solicitor or Solicitors? If so, state the length and occasions of such absence.
6. Have you, during the period of your articles, been engaged or concerned in any profession, trade, or business, other than your professional employment as Clerk to the Solicitor or Solicitors to whom you were articulated or assigned?
7. Have you, since the expiration of your articles, been engaged or concerned in any and what profession, trade, or business, other than the profession of a Solicitor? If so, for how long a time and why were you so engaged or concerned?

No. 32.

Questions to be answered by the Master Solicitor.

Rule 479.

1. Has A.B. served the whole term of his articles at the office where you carry on your business? If not, what was the reason?
2. Has the said A.B. at any time, during the term of his articles, been absent without your permission? If so, for how long a time, and on what occasions was he so absent?
3. Has the said A.B. during the period of his articles been engaged in or concerned in any profession, trade, or business, other than his professional employment as your articulated Clerk?
4. Has the said A.B. during the whole term of his clerkship, with the exception above-mentioned, been faithfully and diligently employed in your professional business of a Solicitor?
5. What have been the moral conduct, character, and habits of the said A.B. during the time he has served under his articles?
6. Do you consider the said A.B. a fit and proper person to be a Solicitor of the Supreme Court?
7. Has the said A.B., to your knowledge, since the expiration of his articles been engaged and concerned in any and what profession, trade, or business, other than the profession of a Solicitor? If so, for how long a time was he so engaged or concerned?

No. 33.

Questions to be answered by two respectable householders to whom the articulated Clerk is personally known.

Rule 479.

1. How long have you known A.B.?
2. What, as far as came under your observation, have been his character and conduct?
3. With reference to these questions, do you consider him to be a fit and proper person to be a Solicitor of the Supreme Court?

No. 34.

Certificate to be signed by the Master Solicitor.

Rule 479.

I, C.D., do hereby certify that A.B. hath duly and faithfully served his Articles of clerkship (or assignment, as the case may be) bearing date the day of _____, for the term therein expressed, and that he is a fit and proper person to be admitted a Solicitor.

No. 35.

RULES
Sch. 1.

In the Supreme Court }
of New South Wales. }

IN the matter of the application of A.B., a Solicitor of the
Supreme Court of , to be conditionally admitted
a Solicitor of the Supreme Court of New South Wales.

On the day of , in the year one thousand nine Rule 461.
hundred and A.B., of Sydney, in the State of New South Wales, a
Solicitor of the Supreme Court of being duly sworn, makes oath and
says as follows :—

1. Before the commencement of the present Term, namely, on the
day of last [or instant], I handed [or caused to be handed] to the
Secretary of the Solicitors' Admission Board a notice of my intention to apply for
admission as a Solicitor, at the end of the present Term, containing my name and
places of residence, a copy whereof is hereunto annexed, marked with the letter
"A."

2. On the said day of last [or instant] I also affixed
[or caused to be affixed] true copies of the said notice in the office of the Court,
and also in the vestibule of the court-house.

3. During the said Term, namely, on the , and
days of , instant, I caused to be inserted in the ,
a daily newspaper published in Sydney, a notice, a true copy whereof is hereunto
annexed, marked with the letter "B."

4. During the said Term, namely, on the , and
days of , instant, I also caused to be inserted in ,
a daily newspaper published in Sydney, a notice, a true copy whereof is hereunto
annexed, marked "B."

Sworn by the Deponent on the day first above }
mentioned, at Sydney, before me,— }

A Commissioner for Affidavits.

No. 36.

In the Supreme Court }
of New South Wales. }

IN the matter of the application of A.B. to be admitted a Solicitor
of the Supreme Court of New South Wales.

On the day of , in the year one thousand nine hundred and Rule 461.
A.B., of , in the State of New South Wales, being duly sworn,
makes oath, and says as follows :—

1. Before the commencement of the present Term, namely, on the
day of last [or instant], I handed [or caused to be handed] to the
Secretary of the Solicitors' Admission Board a notice of my intention to apply for
admission as a Solicitor at the end of the present Term, containing my name and
places of residence and service for the last two years, a copy whereof is hereunto
annexed and marked with the letter "A."

2. On the said day of last [or instant], I also affixed [or
caused to be affixed] true copies of the said notice in the office of the Court, and
also in the vestibule of the court-house.

3. During the said Term, namely, on the , and
days of , instant, I caused to be inserted in the , a daily news-
paper published in Sydney, a notice, a true copy whereof is hereunto annexed,
marked with the letter "B."

4. During the said Term, namely, on the , and
days of , instant, I also caused to be inserted in , a daily news-
paper published in Sydney, a notice, a true copy whereof is hereunto annexed,
marked "B."

5. I have passed all the examinations prescribed by, and have complied
with all the requirements of the Rules of this honorable Court relating to the
admission of Solicitors as appears from the certificate hereunto annexed, marked
"C."

Sworn by the Deponent on the day first above }
mentioned, at Sydney, before me,— }

A Commissioner for Affidavits.

**RULES
Sch. 1.**

1. By Rule dated the day of last past, I was conditionally admitted a Solicitor of this honorable Court for a period of twelve months.

2. I have not been engaged or occupied at any time since my conditional admission as aforesaid in any profession, business, pursuit, or calling other than that of a Solicitor.

3. I have not committed or been privy to or cognisant of any act, omission, matter, or thing disentitling me to confirmation of my said conditional admission as aforesaid.

4. I did on the day of instant serve upon the Secretary of the Solicitors' Admission Board, and also upon the Secretary of the Incorporated Law Institute, a written notice of my intention to apply to this honorable Court to have my said conditional admission as a solicitor confirmed.

Sworn by the Deponent on the day first above }
mentioned, at Sydney, before me,— }

A Commissioner for Affidavits.

APPENDIX TO FIRST SCHEDULE.

THE Board of Examiners of Articled Clerks, with the approval of the Judges, direct the publication of the following as being the books and portions of books in which they intend to conduct the Intermediate and Final Examinations from the 20th day of July, 1902.

ARTHUR G. SADDINGTON,

Secretary to the Board.

Supreme Court, Sydney, 13 December, 1901.

A.—THE INTERMEDIATE EXAMINATION IN LEGAL HISTORY.

1. The Students' Legal History (R. S. Deans).
2. The Law of the Constitution (Dicey).
3. Imperial Law (Webb), chapters 1, 2, and 3.

B.—THE INTERMEDIATE EXAMINATION IN LAW.

1. Williams' "Principles of the Law of Real Property" (18th or later edition).*
2. Williams' "Principles of the Law of Personal Property" (14th edition).*

(Students are advised to study these text-books in conjunction with Millard's Appendix to Williams' Real Property and Millard's Personal Property.)

C.—THE FINAL EXAMINATION.

Section 1.—The Law of Property and Principles of Conveyancing.

1. Dissertations on the Law and Practice of Conveyancing contained in *Prideaux Precedents*, omitting parts relating to the English system of searches for encumbrances and copyholds (preferably 10th edition); to be studied in conjunction with Mr. Hogg's "Hints on the Law and Practice of Conveyancing in New South Wales."

2. The Real Property Act, 1900. (In reference to this Act, students are advised to refer to the notes contained in *Canaway's Real Property Act*.)

3. Williams' "Principles of the Law of Real Property," omitting Part III (18th or later edition).*

4. Williams' "Principles of the Law of Personal Property," omitting Part II, chapters 4 (Bankruptcy) and 6 (so far as relates to Company Law).*

Section 2.—Equity, Probate, Divorce, Bankruptcy, and Company Law.

1. Snell, "Principles of Equity" (11th or later edition).*

2. Walker and Elgood, "Executors and Administrators" (2nd or later edition).*

3. Dixon, "Law of Divorce," omitting part relating to practice (2nd or later edition).*

RULES

Sch. 1.

4. Williams' "Principles of the Law of Personal Property," Part II, chapter 4 (Bankruptcy) and chapter 6 (so far as relates to Company Law).*

[A compendious account of the law in force in New South Wales on these two subjects will be found in Millard's "Law of Personal Property," pages 127 to 166 and 192-218.]

Section 3.—(A) Contracts, Mercantile Law, and Torts.

1. Anson, "Law of Contracts" (8th or later edition).*
2. Pollock, "Law of Torts" (6th or later edition).*
3. Steven, "Mercantile Law," Part II (3rd or later edition).*

Section 3.—(B) Criminal Law and the Law of Evidence.

1. Harris, "Criminal Law" (5th or later edition).*
2. The Crimes Act, 1900, omitting sections prescribing punishments. (In reference to this Act, students are advised to refer to the notes contained in Hamilton and Addison's Crimes Act, 1900.)
3. Stephen, "Digest of the Law of Evidence" (5th or later edition).*
4. The Evidence Act, 1898.
5. The State Law and Records Recognition Act, 1901 (Federal).

Section 4.—(A.) Supreme Court Practice.

1. The Common Law Procedure Act, 1899, and Rules.
2. The Equity Act, 1901, and Rules
3. The Wills, Probate, and Administration Act, 1898, Part II, and Rules.
4. The Matrimonial Causes Act, 1899, and Rules.
5. The Bankruptcy Act, 1898, and Rules.

Section 4.—(B.) Inferior Court Practice.

1. The District Court Act, 1901, and Rules.
2. The Small Debts Recovery Act, 1899.
3. The Justices Act, 1902.
4. The Police Offences Act, 1901, Parts I and II.

(In default of a more recent publication, students are still advised to refer to Wilkinson's "Australian Magistrate" (6th edition), and especially to those parts which relate to "Appeals," "Apprehension of Offenders," "Arrest," "Attorney-General," "Certiorari," "Constables," "Contractors' Debts," "Coroners," "Criminal Information," "Deserted Wives and Children," "Distress," "Habeas Corpus," "The Justices Acts," "Mandamus," "Masters and Servants," "Petty Sessions," "Kent and Replevin," "Small Debts Recovery," "Sureties," "Tenants.")

[Students are reminded that, in this paper, questions may be asked with respect to the different methods of appealing from, or correcting, the decisions of the Inferior Courts.]

Notice to Candidates for the Intermediate and Final Examinations in Law.

1. The English-text books prescribed for these examinations are, in a great measure, prescribed for the purpose of indicating the scope and subject matter of the examination; but, on all subjects where the law in force in New South Wales differs from the English law, candidates are required to make themselves acquainted with the law in force in New South Wales. Text-books, or parts of books which require to be read in connection with local statutes, are marked with an asterisk.

2. Candidates are reminded that English statutes, passed after the 25th July, 1828, are not in force in this State, except in cases where the enactment has been made binding by the Imperial Parliament, either expressly or by necessary implication. At the same time, a considerable number of English statutes passed after that date (such as the English Wills Act, 1837), have been expressly adopted by the local legislature: whilst a considerable number of local enactments (such as the Bills of Exchange Act, 1887) have been based on similar enactments previously passed in the United Kingdom. As to how far law in force in England prior to 25th July, 1828, applies in New South Wales, reference may be made to Webb's "Imperial Law." As to how far English statutes have been adopted by, or embodied in, local legislation, reference may be made to McIntyre and Curlewis' "Tables of Statutes," although these must now be consulted in conjunction with the "Index to the Consolidated Statutes."

3. In cases where local statutes are expressly prescribed as subjects for examination, the examination will be confined, so far as possible, to the general tenor and essential or more important provisions of the statutes referred to: or, in other words, to such matters as would find a place in a student's text book. The English text-books will serve, to some extent, as a guide in this matter.

**RULES
Sch. 1.**

4. Candidates are reminded that the State laws on some of the subjects included in these examinations are liable to be superseded by Federal legislation; whilst on other subjects the existing Acts are likely to be displaced by Consolidated Acts. Candidates are further reminded that they are liable to be examined in any Acts or Rules relating to the subjects of these examinations passed or made by either the State or the Federal Parliament more than six calendar months prior to the date at which such examinations may be held.

5. Candidates are also advised, prior to entering on their studies for the final examination, to make themselves acquainted with the general tenor of both the Interpretation Act, 1897 (New South Wales), and the Acts Interpretation Act, 1901 (Commonwealth); whilst they are also reminded that the interpretation of Imperial statutes, applicable in either State or Commonwealth, is governed by the Interpretation Act, 1889 (Imperial).

6. Where chapters, sections, or pages are referred to, the reference is to be deemed "inclusive," unless otherwise expressed.

SECOND SCHEDULE.**FEES (COMMON LAW JURISDICTION) PAYABLE AT THE
PROTHONOTARY'S OFFICE.**

	£	s.	d.
Administering oath of allegiance or office	0	10	6
Filing articles of clerkship	5	5	0
" assignment of articles	1	1	0
Affixing seal of Court to any Commission or document ..	0	10	6
Every certificate of a Judge	0	5	0
" Prothonotary or Chief Clerk	0	2	6
On references of any nature to the Prothonotary or Chief Clerk, for each attendance not exceeding one hour ...	1	1	0
For every additional hour	1	1	0
For report or award thereon	1	1	0
The like where very special	2	2	0
If required to attend at any other than his own office (over and above necessary travelling expenses) an additional	1	1	0
For every recognizance of whatever kind or for approving any bond	0	5	0
For each name beyond the first	0	2	6
For each office search	0	1	0
The like—Judgments under 3 years old	0	1	0
" over 3 years and under 7 years old	0	5	0
" over 7 years old	0	10	6
On every Chamber Summons	0	1	0
" " " with stay of proceedings	0	2	6
Entering any matter in Chamber List	0	2	6
" " " Term List	0	5	0
For a Judge's Order (in all cases)	0	2	6
For every Rule of Court	0	5	0
Taxing Costs—where amount of bill as taxed does not exceed £12 10s.	0	5	0
If every other case 2 per cent. on the amount allowed,			
On every appointment to tax costs, proceed with reference, and the like	0	1	0
Filing Memorandum for New Trial, &c., return to any writ, and exception to Bail	0	2	6
Filing any other document, including Chamber affidavits	0	1	0
On every writ issued in an action, including subpoenas ..	0	5	0
" every writ not being issued in an action	0	10	0
" entering appearance (including fee for filing)	0	3	6
" putting in Special Bail	0	5	0
" withdrawing any pleading	0	5	0
" entering cause for Assessment or Trial	0	10	0
" entering every verdict or Judgment of nonsuit	0	5	0
" signing judgment after verdict (including filing fee) ...	0	10	0
" " in other cases " "	0	5	0
" " on Warrant of Attorney	0	15	0
" " on old Warrant of Attorney	1	1	0

RULES**Sch. 2.**

For recording and endorsing every <i>cognovit</i> or Warrant of Attorney	0	2	6
On entering satisfaction of Judgment	0	2	6
„ „ any suggestion on the Record	0	2	6
„ money paid into Court with pleas, for security, or for any purpose, for every sum of 20s.	0	0	3
„ every trial or assessment of damages	0	7	6
„ every witness sworn	0	1	6
„ every exhibit put in	0	1	0
„ every office copy, per folio of 72 words	0	0	4
For certifying such copy	0	1	0
On searching Registers or Bills of Sale, for every search against one person	0	0	6
For every search of Index to Registers, by the person requiring information, against each person	0	1	0
For filing and entering every Bill of Sale or a copy thereof	0	2	6

THIRD SCHEDULE.**COMMISSIONERS' FEES.**

	£	s.	d.
Every oath administered	0	1	0
„ „ in the country	0	2	0
Marking each exhibit	0	0	6
Every oath administered out of the Jurisdiction	0	5	0
Every oath before a Commissioner, not at his own residence or office	0	5	0
If Commissioner has to go beyond a mile from his office or residence (in addition to travelling expenses) for administering one oath	1	1	0
If more than one oath be administered at the same time and place then for administering second and subsequent oaths, for each oath	0	5	0
On references of any nature, for each attendance not exceeding one hour	1	1	0
For every additional hour	1	1	0
For his Report or award thereon	1	1	0
The like where very special	2	2	0
Every examination of a witness or other person (including taking down and certifying the same) the like fees as on references.			
If required to attend at other than his own office or residence (in addition to travelling expenses) an additional	1	1	0
Every Recognizance of whatever kind, or for approving any Bond	0	5	6
For each name beyond the first	0	2	6
Commissioner executing any writ of Trial or Inquiry, including the summoning of Assessors, not exceeding one hour	2	2	0
For every additional hour	1	1	0
Fee for taking any acknowledgment	0	5	0
„ verification of any certified copy	0	2	6
If Commissioner has to go beyond a mile from his office or residence (in addition to his travelling expenses) an additional	1	1	0
For every Writ of Summons issued in any action, including every duty connected therewith, except the administering of any oath or oaths	0	10	0
For every Subpoena in a Civil case issued by him	0	5	0
For taking every Statutory Declaration when authorised by Statute to take same, the same fee as on administering oaths.			
For attesting documents required to be attested by a Commissioner for Affidavits, the same fees as on administering oaths.			

RULES
Sch. 4.**FOURTH SCHEDULE.****SCALES OF COSTS.**

	Highest scale.	Second Scale.	Lowest Scale.
<i>Writs, Summonses, and Warrants.</i>			
Writ of Summons on the commencement of any action	£ s. d. 0 13 4	£ s. d. 0 10 0	£ s. d. 0 6 8
Special Indorsement	0 5 0	0 4 0	0 3 0
Concurrent Writ of Summons	0 6 8	0 5 0	0 4 0
Renewal of a Writ of Summons	0 6 8	0 5 0	0 4 0
Notice of Writ for Service (in lieu of Writ) out of the Jurisdiction	0 6 8	0 5 0	0 4 0
Writ of Foreign Attachment, including Notice	0 15 0	0 12 0	0 7 6
Writ of Inquiry, Mandamus, Prohibition, Attachment or Habeas Corpus	1 1 0	0 15 0	0 10 0
For every folio over five folios	0 1 6	0 1 3	0 1 0
Writ of Subpcna ad testificandum duces tecum	0 13 4	0 10 0	0 6 8
For each folio beyond five	0 1 6	0 1 3	0 1 0
Writ or Writs of Subpcna ad testificandum for any number of persons not exceeding four and the same for any additional number not exceeding four	0 13 4	0 10 0	0 6 8
Renewing Writ of Execution	0 6 8	0 5 0	0 3 4
Lodging renewal with Sheriff	0 5 0	0 4 0	0 3 0
These fees include all Indorsements and Præcipes and Attendances to issue or seal, except where otherwise provided, but not the Court Fees.			
Summonses to attend at Chambers	0 5 0	0 4 0	0 3 0
Or if special, at Taxing Officer's discretion, not exceeding	1 1 0	0 15 0	0 13 4
Each Copy to file or to serve	0 1 6	0 1 3	0 1 0
For each folio beyond three	0 0 6	0 0 4	0 0 3
Attending to get same signed	0 6 8	0 5 0	0 4 0
Attending to file Chamber Summons and Affidavits in support	0 4 0	0 3 0	0 2 6
Indorsing Notice of Intention to use papers or Affidavits filed, including copy and service	0 5 0	0 4 0	0 3 0
<i>Services and Notices.</i>			
Service of any Writ, Summons, Warrant, Petition, Order or Notice on a party who has not entered an appearance	0 6 8	0 5 0	0 4 0
If served at a distance of more than two miles from the nearest place of business or office of the Solicitor serving the same, discretionary.			
Where in consequence of the distance of the party to be served, it is proper to effect such service through an Agent, other than the Sydney Agent, for correspondence in addition			
Where more than one attendance is necessary to effect service such further allowance may be made as the Taxing Officer shall think fit.	0 7 6	0 6 0	0 5 0
For service out of the Jurisdiction such allowance is to be made as the Taxing Officer shall think fit.			
Service where an appearance has been entered on the Solicitor or party	0 4 0	0 3 0	0 2 6
Where any Writ, Order, or Notice or any two of them are or ought to be served together, one fee only for service shall be allowed.			

RULES
Sch. 4.

	Highest Scale.	Second Scale.	Lowest Scale.
<i>Services and Notices—continued.</i>			
£ s. d.	£ s. d.	£ s. d.	
The amount to be allowed as fees properly paid for service of a writ, or any other document which requires personal service, shall be as follows:—			
(a) If served by the nearest Sheriff's officer, the amount properly paid to the Sheriff or to such officer in accordance with the scale of fees in force for the time being ;			
(b) If served by any other person, the amount (not exceeding the amount payable under sub-clause (a) hereof) actually paid to such person, consisting of (i) the fee paid for swearing the affidavit of service, (ii) reasonable and necessary expenses of travelling and sustenance, and (iii) a fee of 7s. 6d. with an additional 7s. 6d. for each day necessarily occupied after the first day.			
In addition to the above fees the following allowances are to be made:—			
Copy Writs for service	0 1 6	0 1 3	0 1 0
For preparing Notice to Produce on the trial or hearing of an action or Notice to Admit, including service	0 7 6	0 6 0	0 5 0
If necessarily more than four folios, for every additional folio	0 1 6	0 1 3	0 1 0
And for each necessary copy	0 2 0	0 1 6	0 1 0
If exceeding four folios—for each additional folio	0 0 6	0 0 4	0 0 3
For preparing Notice of Motion	0 5 0	0 4 0	0 3 0
For every folio over three	0 1 6	0 1 3	0 1 0
Copy for service	0 1 6	0 1 3	0 1 0
For every folio over three	0 0 6	0 0 4	0 0 3
Copies for Service of Petitions and of Orders, with necessary Notice (if any) to accompany, per folio	0 0 6	0 0 4	0 0 3
For preparing and serving Notice of Appearance, to Plead, of Trial, of Hearing, of Inquiry, or of any appointment by Prothonotary	0 5 0	0 4 0	0 3 0
<i>Appearances.</i>			
Preparing and Entering an Appearance	0 9 0	0 7 6	0 6 0
If a person appearing to a Writ of Summons in Ejectment limits his Defence by his Memorandum of Appearance, in addition to the above	0 5 0	0 4 0	0 3 0
<i>Instructions.</i>			
To sue or defend, including Warrant	0 13 4	0 10 0	0 6 8
For Declaration or other pleading, or Demurrer, or amendment thereof	0 6 8	0 5 0	0 3 4
	to	to	to
	2 2 0	1 10 0	1 1 0
For Special case (discretionary).			
For affidavit	0 6 8	0 5 0	0 3 4
	to	to	to
	1 1 0	0 15 0	0 10 0
To appeal against Order of Court or Judge	0 6 8	0 5 0	0 3 4
	to	to	to
	1 1 0	0 15 0	0 10 0
For Counsel to advise on Evidence	0 6 8	0 5 0	0 3 4
	to	to	to
	1 1 0	0 15 0	0 10 0

**RULES
Sch. 4.**

	Highest Scale.	Second Scale.	Lowest Scale.
<i>Instructions—continued.</i>	£ s. d.	£ s. d.	£ s. d.
For Brief on hearing or trial of Action, or on Assessment of Damages (discretionary).			
To retain Counsel, including preparation of Retainer—Retainer for only one Counsel will be allowed	0 6 8	0 5 0	0 3 4
In actions under 2nd and 3rd Scales no retainer of Counsel will be allowed unless the Taxing Officer consider it necessary.			
For Bond or other similar document	0 6 8	0 5 0	0 3 4
For Writ of Foreign Attachment, Claim for Mandamus or Injunction	0 10 0	0 7 6	0 5 0
For or in opposition to any Motion to be made in Court	0 6 8	0 5 0	0 3 4
	to	to	to
	1 1 0	0 15 0	0 10 0
For or in opposition to any Application to a Judge in public or private Chambers, except ex parte Applications in respect of pleadings	0 6 8	0 5 0	0 3 4
	to	to	to
	0 13 4	0 10 0	0 6 8
For Brief on Application to the Court or on Appeal, or on Commission, or de bene esse Examination	0 13 4	0 10 0	0 6 8
	to	to	to
	5 5 0	3 3 0	2 2 0
For Brief on Application in Chambers	0 13 4	0 10 0	0 6 8
	to	to	to
	2 2 0	1 10 0	1 1 0
Instructions for and preparing, Watching Brief on Opponent's Application for Rule Nisi for New Trial	0 13 4	0 10 0	0 6 8
An allowance in the nature of Instructions for Brief may be allowed to the Solicitor when he conducts Case, Motion, or Application himself			
For every Suggestion, Issue of Fact by consent, Writ of Revivor without Rule, Rule for Writ of Revivor to proceed with Action or defend for Executor after suggestion of death, agreement as to amount of damages or for Confession in Action of Ejectment, as to whole or any part	0 10 0	0 7 6	0 5 0
In any case of a nature similar to any of the above not herein specially provided for (discretionary).			
<i>Drawing Pleadings and other Documents.</i>			
Declaration	0 10 0	0 7 6	0 5 0
Or per folio	0 1 6	0 1 3	0 1 0
Pleas, Replication, Demurrer or other Pleading	0 5 0	0 4 0	0 3 0
Or per folio	0 1 6	0 1 3	0 1 0
Affidavits, Order for further time to plead, Order to plead several matters, Order to take money out of Court, Order to take Exhibits out of Court, Rule Nisi, Rule Absolute, Incipitur of Judgment, Judgment Roll, Issues for Trial, Suggestion, Special Case, Special particulars of Demand, or other necessary Documents not specially mentioned	0 5 0	0 4 0	0 3 0
Or per folio	0 1 6	0 1 3	0 1 0
Brief, per folio	0 1 6	0 1 3	0 1 0
Brief to Counsel to hear reserved Judgment, including Copy (except in Chamber matters)	0 6 8	0 5 0	0 3 4
Fees to Counsel thereon	3 3 0	2 2 0	1 1 0
Bill of Costs for Taxation, including copy for the Taxing Officer, per folio	0 1 6	0 1 3	0 1 0

RULES
Sch. 4.

	Highest Scale.	Second Scale.	Lowest Scale.
<i>Drawing Pleadings and other Documents.—contind.</i>	£ s. d.	£ s. d.	£ s. d.
No more than one affidavit of increase is to be allowed, unless in the opinion of the Taxing Officer more than one Affidavit was necessary.			
Affidavit of service of Summons, Subpœna, or other document where served in a different place to the town where the Solicitor is practising ...	0 5 0	0 4 0	0 3 0
Marking each Annexure or Exhibit to any Affidavit	0 0 6	0 0 4	0 0 3
<i>Copies.</i>			
Of Pleadings, Briefs, and other Documents, where no other provision is made, at per folio ...	0 0 6	0 0 4	0 0 3
If necessarily on Parchment ...	0 0 8	0 0 6	0 0 5
Where Briefs or other Documents are typewritten, only half the amount shall be allowed for any second copy and one-fourth for any third or additional copy. No allowance will be made for letterpress copies.			
Where pursuant to Rules of Court any documents are printed, the Solicitor of the party printing shall be allowed for a copy for the printer, at per folio	0 0 6	0 0 4	0 0 3
The Taxing Officer shall only allow for a copy of such documents when, in his opinion, it would not be reasonably safe to send the original to the printer.			
And for examining the proof print, at per folio ...	0 0 2	0 0 2	0 0 2
For examining revise	0 5 0	0 5 0	0 5 0
	to	to	to
	1 0 0	0 15 0	0 10 0
And for printing—the amount actually and properly paid to the printer.			
These allowances are to include all attendances on the printer.			
In agency matters—close copies are not to be allowed, as of course, but the allowance is to depend on the propriety of making or sending the copies, which in each case is to be shown and considered by the Taxing Officer.			
<i>Perusals.</i>			
Of Declaration or other Pleading, Special Case, or other similar document, by the Solicitor to whom the same is delivered ...	0 4 0	0 3 0	0 2 6
Or per folio	0 0 4	0 0 3	0 0 2
Of Notice to Produce on Trial or Hearing of Action, and Notice to Admit, by the Solicitor to the party served, including looking up documents..	0 13 4	0 10 0	0 6 8
Of Affidavit—by the Solicitor of the party against whom the same can be read—per folio ...	0 0 4	0 0 3	0 0 2
<i>Attendances.</i>			
To obtain consent of next friend to sue in his name or of a Guardian ad litem ...	0 10 0	0 7 6	0 5 0
To deliver or file any document not being a Writ of Summons	0 4 0	0 3 0	0 2 6
To inspect or produce for inspection documents pursuant to a Notice to Admit, or to examine and sign Admissions, or to inspect or produce for inspection documents referred to in any Affidavit of Documents	0 6 8	0 5 0	0 3 4

**RULES
Sch. 4**

	Highest Scale.	Second Scale.	Lowest Scale.
<i>Attendances—continued.</i>			
Or per hour	£ s. d. 0 13 4	£ s. d. 0 10 0	£ s. d. 0 6 8
To obtain or give any necessary or proper consent or undertaking	0 6 8	0 5 0	0 3 4
To obtain an appointment to examine Witnesses ...	0 6 8	0 5 0	0 3 4
On examination of Witnesses before the Prothono- tary, Commissioner, Officer, or other person with Counsel	1 1 0	0 15 0	0 10 6
For every hour after the first	0 13 4	0 10 0	0 6 8
Or if without Counsel	2 2 0	1 10 0	1 1 0
For every hour after the first	2 2 0	1 10 0	1 1 0
If examination more than two miles from place of business of Solicitor then such additional allowance as the Taxing Officer may deem reasonable.			
On Deponents being sworn, or by a Solicitor or his clerk to be sworn to an Affidavit	0 6 8	0 5 0	0 3 4
On a Summons in Chambers with Counsel when matters argued	0 13 4	0 10 0	0 6 8
	to 1 1 0	to 0 15 0	to 0 13 4
If Matter in List but not argued	0 6 8	0 5 0	0 3 4
	to 0 13 4	to 0 10 0	to 0 6 8
If without Counsel	2 2 0	1 10 0	1 1 0
	to 3 3 0	to 2 2 0	to 1 10 0
On Counsel—with Brief or other papers :—			
If Counsel's Fee under 10 guineas	0 6 8	0 5 0	0 3 4
If more and under 20 guineas	0 13 4	0 10 0	0 6 8
If more	1 1 0	0 15 0	0 10 0
On Consultation or Conference with Counsel ...	0 13 4	0 10 0	0 6 8
	to 2 2 0	to 1 10 0	to 1 1 0
NOTE.—In all cases where the amount sued for, or the value of the matter sought to be recovered, shall not exceed £100, it shall be in the discretion of the Taxing Officer whether he will allow more than one Counsel.			
To set down Special Case, Demurrer, or Action for hearing or trial	0 6 8	0 5 0	0 3 4
In Court on hearing of Motion, Special Case, Petition, Demurrer, Appeal, or any other hear- ing where no witnesses examined, per day ...	0 13 4	0 10 0	0 6 8
	to 4 4 0	to 3 3 0	to 2 2 0
If the Solicitor appears without Counsel—such allowance may be made as the Taxing Officer thinks fit.			
For each day when Cause set down and not in List	0 6 8	0 5 0	0 3 4
In Court where Cause or matter is in List but not heard	0 13 4	0 10 0	0 6 8
On hearing or trial of any Cause or Matter or Issue of Fact, in Sydney, or the town where the Solicitor resides or carries on business, per day	1 1 0	0 13 4	0 10 6
	to 5 5 0	to 4 4 0	to 3 3 0
Clerk's attendance, if more than ten Witnesses, per day	1 1 0	0 15 0	0 13 4
When not in Sydney, nor in the town where the Solicitor resides or carries on business, for each day (except Sundays) he is necessarily absent...	5 5 0	4 4 0	3 3 0
If Clerk attend in place of Principal	3 3 0	2 12 6	2 2 0

RULES
Sch. 4.

	Highest Scale.	Second Scale.	Lowest Scale.
	£ s. d.	£ s. d.	£ s. d.
<i>Attendances—continued.</i>			
Solicitor's expenses (besides actual reasonable travelling expenses) each day, including Sundays	1 1 0	1 1 0	1 1 0
If Clerk of Solicitor attend in place of Principal ...	0 15 0	0 15 0	0 15 0
If the Solicitor has to attend on more than one trial at the same time and place, in each case ...	2 12 6	2 2 0	1 11 6
If Clerk attend on more than one trial in place of Principal, in each case ...	1 11 6	1 7 0	1 1 0
The expenses in such cases to be ratably divided.			
On taxation of a Bill of Costs	0 6 8	0 5 0	0 3 0
Unless the same shall necessarily occupy so much time that the Taxing Officer shall consider such amount inadequate, in which case he may allow such further Fee as he may think proper.			
On printer to insert advertisement in <i>Gazette</i> , or other paper, each printer	0 6 8	0 5 0	0 3 4
To obtain signature of Judge to any Order made by him, or to obtain signature and seal to any Rule of Court	0 7 6	0 6 0	0 5 0
To obtain appointment to tax, or other appointment to be signed by a clerk in the Prothonotary's Office	0 4 0	0 3 0	0 2 6
Every copy and service of any such appointment ...	0 5 0	0 4 0	0 3 0
To search for Præcipe for, or appearance to Writ of Summons, or for any pleading filed, or other matter set down, or for Memo. for new Trial, or for any other search of a similar nature—except in connection with matters in Chambers	0 4 0	0 3 0	0 2 6
To bespeak and for copy Jury Panel	0 6 8	0 5 0	0 3 4
To bespeak and obtaining money out of Court ...	0 10 0	0 6 8	0 5 0
Upon reference to Prothonotary upon matters, such as to fix security for costs, settle bond or other similar matters, per hour	0 13 4	0 10 0	0 6 8
	to	to	to
	1 1 0	0 15 0	0 10 0
On ex parte application to Judge for Order Nisi or Rule Nisi	0 13 4	0 10 0	0 6 8
	to	to	to
	1 1 0	0 15 0	0 10 0
Attending to search Term List during each term Matter is in the Term List and is not in the paper for any day or not heard during that Term	2 0 0	1 10 0	1 0 0
Attending Court on Opponent's Application for Rule Nisi for new Trial	0 13 4	0 10 0	0 6 8
	to	to	to
	2 2 0	1 10 0	1 1 0
Entering Proceedings on the Roll where no contested Trial	0 12 6	0 8 4	0 6 3
After Trial	0 18 0	0 15 0	0 9 0
<i>Ejectment Actions.</i>			
Instructions to sue and examining Deeds... ..	0 13 4	0 10 0	0 6 8
If question of Title	1 1 0	0 15 0	0 10 0
Writ of Ejectment, including Præcipe and indorsement and attending to issue, but not including Fees paid	0 15 0	0 10 0	0 7 6
For every folio over five	0 1 6	0 1 3	0 1 0

RULES
Sch. 4.

	Highest Scale.	Second Scale.	Lowest Scale.
	£ s. d.	£ s. d.	£ s. d.
<i>Costs of Writs to be allowed by Prothonotary without Taxation.</i>			
Writ of Fieri facias, including Præcipe and attending to issue and to lodge with Sheriff, but not including Fees paid	1 10 0	1 0 0	0 15 0
Affidavit of debt	0 15 0	0 12 0	0 10 0
Writ of Habere facias possessionem and Fieri facias, including Præcipe and attending to issue and attending lodging with Sheriff, but not including Fees paid	1 15 0	1 5 0	1 0 0
Writ of Capias ad satisfaciendum, including attending to issue and lodging with the Sheriff, but not including Fees paid where Writ issued as of course without Judge's Order	1 10 0	1 0 0	0 15 0
Writ of Capias ad satisfaciendum where same is issued under Judge's Order, including preparing Affidavit or Affidavits and Order, and making application for obtaining same and attending for and lodging, but not including Fees paid ...	3 3 0	2 2 0	1 1 0
<i>Arbitration.</i>			
On taxing costs in Arbitrations the Taxing Officer may take the scales of Fees in contested actions as a guide to the amounts to be allowed.			
<i>Views by Jury.</i>			
Such fees shall be allowed as the Taxing Officer may consider necessary, including Fees paid for cabs, steamers, or other conveyances.			
<i>Maps, Plans, and Models.</i>			
The Taxing Officer may allow such Fees for Maps, Plans, or Models at the Trial as he may consider reasonable			
<i>Costs in Undeferred Actions.</i>			
Costs of Writ of Summons whether for action of debt or for liquidated demand, including Instructions, all letters before Action, issuing copy or copies to serve, Fees paid, also service and attending settling amount of claim as to possession, the amount thereof to be indorsed on the Writ ...	4 4 0	3 3 0	2 2 0
Costs of Final Judgment whether in action of debt or liquidated demand, in case of non-appearance by Defendant, in addition to the abovementioned costs: but including the necessary Affidavit or Affidavits of Service, and also including Court Fees paid	2 2 0	1 11 6	1 1 0
Costs of Judgment by default for want of appearance when Defendant resides within the jurisdiction, and Plaintiff recovers a sum not exceeding thirty pounds, and obtains a Judge's certificate that there was sufficient reason for bringing the action in the Court... ..	.....	...	3 3 0

RULES
Sch. 4.

	Highest Scale.	Second Scale.	Lowest Scale.
<i>Costs in Undeferred Actions. --continued.</i>			
	£ s. d.	£ s. d.	£ s. d.
Costs of Judgment by default for want of a plea in the like case	.....	.....	4 4 0
The amounts mentioned in the four preceding items are to be exclusive of the fees properly paid for service.			
<i>Term Fees.</i>			
For every term in which a proceeding in the Cause or Matter by or affecting the party after Declaration filed, or in Action of Ejectment after issue filed, shall take place	0 15 0	0 12 0	0 10 0
And further in country Agency Causes or Matters, for letters	0 6 0	0 6 0	0 6 0
Where no Proceedings in the Cause or Matter is taken which carries a Term Fee, a charge for letters may be allowed if the circumstances require it.			
Necessary Letters	0 3 6 to 1 0 0	0 3 0 to 0 15 0	0 2 6 to 0 10 0
Circular Letters, after first	0 1 6	0 1 3	0 1 0
<i>Allowances to Witnesses.</i>			
Barristers, solicitors, medical practitioners, surveyors, architects, and other professional men, per day	1 1 0	1 1 0	1 1 0
If country witnesses, an additional daily allowance	0 5 0 to 1 1 0	0 5 0 to 1 1 0	0 5 0 to 1 1 0
Merchants, bankers, accountants, auctioneers, and the like, per day	0 10 6 to 1 1 0	0 10 6 to 1 1 0	0 10 6 to 1 1 0
If country witnesses, an additional daily allowance	0 5 0 to 0 12 6	0 5 0 to 0 12 6	0 5 0 to 0 12 6
Tradesmen, master-mariners, clerks, and the like, per day	0 7 6 to 0 15 0	0 7 6 to 0 15 0	0 7 6 to 0 15 0
If country witnesses, an additional daily allowance	0 2 0 to 0 4 0	0 2 0 to 0 4 0	0 2 0 to 0 4 0
Artisans, journeymen, sailors, labourers, and the like, per day	0 5 0 to 0 7 6	0 5 0 to 0 7 6	0 5 0 to 0 7 6
If country witnesses, an additional daily allowance	0 2 0 to 0 3 0	0 2 0 to 0 3 0	0 2 0 to 0 3 0
Female witnesses, according to station in life	0 2 6 to 0 10 6	0 2 6 to 0 10 6	0 2 6 to 0 10 6

**RULES
Sch. 4.**

	Highest Scale.	Second Scale.	Lowest Scale.
<i>Allowances to Witnesses.—continued.</i>			
If country witnesses, an additional daily allowance	£ s. d. 0 2 0 to 0 6 0	£ s. d. 0 2 0 to 0 6 0	£ s. d. 0 2 0 to 0 6 0
No witness shall be deemed to be a country witness who resides within five miles of the principal Post Office or Court-house of the town where the suit is tried, or who ordinarily proceeds to some office or place of employment within five miles of such Post Office or Court-house.			
In addition to the above allowances, country witnesses may be allowed such sums as the Taxing Officer thinks reasonable, to provide for actual expenses of conveyance to and from the place of trial, excluding any charges for maintenance or sustenance while travelling.			
In every case the Taxing Officer may allow such expenses as he may think have been reasonably and properly incurred and paid to witnesses for qualifying to give skilled evidence.			
<i>Disbursements.</i>			
All Court Fees, and Counsel's Fees, Service, Mileage, and other Fees and payments which in the opinion of the Taxing Officer have been properly paid, shall be allowed.			
1. In all cases which come within the Second and Third Scales when considering allowances which are discretionary, such as Instructions for Brief on Trial, Counsel's Fees, &c., Taxing Officers are to exercise their discretion in a manner consistent with the Scales, i.e., by allowing less than would be allowed, if the case came within the First Scale.			
2. In all cases Taxing Officers shall consider whether there is a reasonable necessity to obtain Counsel's advice on evidence; and copies of pleadings and documents will not be allowed for in the Brief to Advise on Evidence as well as in the Brief on Trial.			
3. In no case is any fee paid to Counsel to be allowed unless evidence by the production of a voucher or otherwise is given to satisfy the Taxing Officer that the fee has actually been paid to Counsel.			
<i>General.</i>			
In any case in which no special provision is made herein, and in which in the opinion of the Taxing Officer an allowance should be made, such sum shall be allowed as shall seem just and reasonable.			

RULES
1-2.**ADDITIONAL GENERAL RULES.**

WEDNESDAY, THE 25TH DAY OF MARCH, 1903.

The following General Rules are hereby promulgated :—

1. The duties of the Prothonotary under the Rules of the 22nd December, 1902, may, in his absence, or during his indisposition, or at his request, be performed by the Chief Clerk of the Supreme Court.

2. No person shall be deemed to be a Managing Clerk within the meaning of the said Rules until he has attained the age of, at least, 25 years.

M. H. STEPHEN, A.C.J.

H. E. COHEN, J.

W. GREGORY WALKER, J.

COMMONWEALTH ACTS.

STATE LAWS AND RECORDS RECOGNITION ACT 1901.

ACT No. V., 1901.

An Act to provide for the recognition throughout the Commonwealth of the Laws, the Public Acts and Records, and the Judicial Proceedings of the States.
[Assented to 5th September, 1901.]

BE it enacted by the King's Most Excellent Majesty the Senate and the House of Representatives of the Commonwealth of Australia as follows :—

PRELIMINARY.

1. This Act may be cited as the "State Laws and Records Short title. Recognition Act 1901."

2. In this Act, unless the contrary intention appears — Definitions.
- "Court" includes all judges and justices and all arbitrators under any Act or State Act, and all persons authorized by law or by consent of parties to hear receive and examine evidence.
- "Courts within the Commonwealth" includes the High Court and all Federal Courts and Courts exercising federal jurisdiction, the Inter-State Commission when sitting as a Court for the hearing or determination of any matter, and all Courts of the several States and parts of the Commonwealth.
- "The Governor of a State" means the person for the time being administering the Government of a State, and includes the Governor of a State with the advice of the Executive Council thereof.

JUDICIAL NOTICE.

3. All Courts within the Commonwealth shall take judicial notice of all Acts of the Parliament of any State.
4. All Courts within the Commonwealth shall take judicial notice of the impression of the seal of any State without evidence of such seal having been impressed or any other evidence relating thereto.

State laws to be judicially noticed.
See Qd., 62 Vic. No. 15, s. 3.

Fed. Council, 49 Vic. No. 2. Seals of States to be judicially noticed.
See Qd., *ibid* s. 4.

8. 5.

8. All Courts within the Commonwealth shall take judicial notice—

Certain signatures, &c., to be judicially noticed.

See Qd., 62 Vic., s. 10.
F.C., *ibid.* s. 6.

- (a) of the signature of any person who holds or has held in any State the office of Governor, Judge of the Supreme Court, Prothonotary, Master Registrar or Chief Clerk of the Supreme Court, Judge or Commissioner of any Court of Bankruptcy or Insolvency, Curator of Intestate Estates, Commissioner of Titles, Registrar of Titles, Assistant or Deputy Registrar of Titles, Registrar-General, Assistant or Deputy Registrar-General, Government Statist, Assistant or Deputy Government Statist, Judge or Presiding Magistrate of any County Court or District or Local Court or Court of Mines, Chairman of any Court of General or Quarter Sessions, or Police or Stipendiary or Special Magistrate or Justice of the Peace, or any office corresponding to any of the aforesaid offices, or any office to which the Governor-General may by Order published in the *Gazette* declare this section to apply; and

(b) of the seal of every such Court or person; if such signature or seal purports to be attached or appended to any decree, order, certificate, or other judicial or official document.

Semble.—The appointment of a Justice of the Peace in another State may be proved in Courts of Petty Sessions in Victoria by production of the local *Government Gazette* containing the order-in-council appointing him: *Rex v. Panton*, (1902) A.L.R. 172.

Justices of the Peace.—An application was made on June 19th, 1902, to *a'Beckett, J.*, on behalf of the administrator for an order dispensing with sureties to the administration bond. The affidavits in support showed circumstances which warranted the Court in making the order asked for; the only difficulty arising from the fact that these affidavits had been sworn before a Justice of the Peace at Temora, N.S.W.

There was no verification of the signature, but a certificate signed by the Prothonotary of the Supreme Court of N.S.W. was filed, to the effect that an affidavit so sworn would be receivable in probate matters in N.S.W.

His Honour reserved his decision, and on July 2nd stated that he would make the order as sought: *In the Estate of Jas. Brown*, (1902) 8 A.L.R. C.N. 53.

PROOF OF CERTAIN DOCUMENTS.

6. (1) Evidence of any proclamation, commission, order, or regulation issued by the Governor of a State, or by or under the authority of any Minister of the Crown for a State, may be given in all Courts within the Commonwealth—

- (a) by the production of the *Government Gazette* of the State purporting to contain the same; or
- (b) by the production of a document purporting to be a copy thereof, and purporting to be printed by the Government Printer of the State, or by the authority of the Government of the State; or
- (c) by the production (in the case of any proclamation, commission, order, or regulation issued by the Governor of a State) of a copy or extract purporting to be certified to be true by the Clerk of the Executive Council of the State; or
- (d) by the production (in the case of any proclamation,

Proof of proclamations, commissions, orders and regulations.

See N.S.W. No. 11, 1898, s. 18.
Vic. No. 1088, s. 17.
Qd., *ibid.* s. 6.

commission, order, or 'regulation issued by or under the authority of any Minister of the Crown for a State) of a copy or extract purporting to be certified to be true by any Minister of the Crown for the State.

S. 6.

(2) No proof shall be required of the handwriting or official position of any person certifying in pursuance of this section.

Government Gazette.—See *Rex v. Panton*, (1902) A.L.R. 172, quoted in note to the preceding section.

7. Evidence of any proclamation or other act of state of any State may be given in all Courts within the Commonwealth by the production of a copy thereof either—

Proof of proclamations and Acts of State.
See No. 11, 1898 (N.S.W.), s. 17.

- (a) proved to be an examined copy thereof, or
- (b) purporting to be sealed with the seal of that State.

8. Whenever by any State Act at any time in force in any State—

Proof of certain public documents.
See 8 & 9 Vic. c. 113, s. 1.
Qd., *ibid.* s. 11

- (a) any public document ; or
- (b) any record required by law to be kept of any public document or proceeding ; or
- (c) any certified copy of any public document or by-law or of any entry in any public register or book.

is admissible in evidence for any purpose in that State, it shall be admitted in evidence to the same extent and for the same purposes, in all Courts within the Commonwealth if it purports to be sealed or impressed with a stamp, or sealed and signed, or signed alone, or impressed with a stamp and signed, as directed by such State Act, without any proof of such seal stamp or signature or of the official character of the person appearing to have signed the same, and without any further proof thereof in every case in which the original document could have been received in evidence.

9. Any public document which by any law at any time in force in any State is admissible in evidence for any purpose in any Court of that State without proof of—

Public document admissible in any State without proof to be admissible throughout the Commonwealth.
See 14 & 15 Vic. c. 99, s. 11.
Qd., *ibid.* s. 7

- (a) the seal or stamp or signature authenticating the same, or
- (b) the judicial or official character of the person appearing to have signed the same,

shall be admissible in evidence to the same extent and for the same purposes in all Courts within the Commonwealth without such proof.

10. Whenever any book or other document of any State is of such a public nature as to be admissible in evidence in that State on its mere production from the proper custody, any copy thereof or extract therefrom shall be admissible in evidence in all courts within the Commonwealth if—

Proof of public books and documents of States.
See 14 & 15 Vic. c. 99, s. 14.
Qd., *ibid.* s. 8.

- (a) it is proved to be an examined copy or extract ; or
- (b) it purports to be signed and certified as a true copy or extract by some officer of that State, who shall further certify that he is the officer to whose custody the original is trusted.

S. 11.

Proof of Votes
and Proceedings
of State Parli-
aments.

See 8 & 9 Vic.
c. 113, s. 3.
Qd., *ibid.* s. 9.
Fed. Council,
49 Vic. No. 2,
s. 5.

11. (1) All copies of the Votes and Proceedings of either House of the Parliament of any State, if purporting to be printed by the Government Printer of that State, shall on the mere production of the same be admitted as evidence thereof in all Courts within the Commonwealth.

(2) In this section "Votes and Proceedings" shall be deemed to include Journals and Minutes, and any papers purporting to be printed by the authority of and to be laid before either House of the Parliament of a State.

PROOF OF CERTAIN MATTERS.

Proof of
Government
Gazette of State.
See No. 1088
(Vic.), s. 24.
F.C., *ibid.* s. 4.

12. The mere production of a paper purporting to be the *Government Gazette* of a State shall in all Courts within the Commonwealth be evidence that such paper is such *Government Gazette* and was published on the day on which it bears date.

Proof of
printing by
Government
Printer of
State.
See Qd., *ibid.*
s. 12.

13. The mere production of a paper purporting to be printed by the Government Printer of a State or by the authority of the Government of a State shall in all Courts within the Commonwealth be evidence that such paper was printed by such Government Printer or by such authority.

Proof of act
done by
Governor or
Minister of
a State.
See No. 1088
(Vic.), s. 25.

14. Where by any law at any time in force the Governor of a State or a Minister of the Crown for a State is authorized or empowered to do any act whatsoever, production of the *Government Gazette* of the State purporting to contain a copy or notification of any such act shall in all Courts within the Commonwealth be evidence of such act having been duly done.

By-laws and
regulations.
See N.S.W. 1898
No. 11, s. 27.

15. Where, by any State Act, power to make by-laws or regulations is conferred upon any person or body, any printed paper purporting to be such by-laws or regulations, and to be printed by the Government Printer of the State, or by the authority of the Government of the State, shall in all Courts within the Commonwealth be evidence—

- (a) That by-laws or regulations in the words printed in such paper were duly made by such person or body ; and
- (b) that such by-laws or regulations have been approved of or confirmed by the Governor of the State, if they appear by such paper to have been so approved of or confirmed.

Proof of
Incorporation
of company.
See Qd., *ibid.*
s. 13.

16. (1) All Courts within the Commonwealth shall admit as evidence of the incorporation of a company incorporated or registered in any State a certificate of the incorporation or registration thereof which purports to be signed by the Registrar or an Assistant or Deputy-Registrar of companies in that State, and the date of incorporation or registration mentioned in such certificate shall be evidence of the date on which the company was incorporated or registered.

See N.S.W. 1898
No. 11, s. 32.

(2) Any copy of or extract from any document kept and registered at the office for the registration of companies in any State, if certified under the hand of the Registrar or an Assistant or Deputy-Registrar, shall in all Courts within the

Commonwealth be admissible in evidence in all cases in which the original document is admissible in evidence and for the same purposes and to the same extent. **S. 16.**

PROOF OF JUDICIAL PROCEEDINGS.

17. Evidence of any judgment decree rule order or other judicial proceeding of any Court of a State, including any affidavit pleading or other legal document filed or deposited in any such Court, may be given in all Courts within the Commonwealth by the production of a copy thereof—

Proof of judicial proceedings of State Court. See N.S.W. No. 11, s. 21. No. 1088 (Vic.) s. 16, U.S.

- (a) proved to be an examined copy thereof ; or
- (b) purporting to be sealed with the seal of such Court ; or
- (c) purporting to be signed by a Judge of such Court with a statement in writing attached by him to his signature that such Court has no seal and without proof of his judicial character or of the truth of such statement.

SUPPLEMENTAL.

18. All public acts records and judicial proceedings of any State, if proved or authenticated as required by this Act, shall have such faith and credit given to them in every Court and public office within the Commonwealth as they have by law or usage in the Courts and public offices of the State from whence they are taken.

Faith and credit to be given to documents properly authenticated. See Constitution s. 118. U.S. Stat. II. 1790, c. 11 ; Stat. I. 1804 c. 56.

19. The provisions of this Act shall be in addition to and not in derogation of any powers existing at common law, or given by any law at any time in force in any State.

This Act not to derogate from existing powers. Qd., *ibid.* s. 14. F.C., *ibid.* s. 7.

See In the Estate of Jas. Brown, see note to sec. 5 (supra).

S. 1.

SERVICE AND EXECUTION OF PROCESS ACT 1901.

ACT No. XI., 1901.

An Act to provide for the Service and Execution throughout the Commonwealth of the Civil and Criminal Process and the Judgments of the Courts of the States and of other parts of the Commonwealth, and for other purposes connected therewith.
[Assented to 16th October, 1901.]

BE it enacted by the King's Most Excellent Majesty the Senate and the House of Representatives of the Commonwealth of Australia as follows:—

PART I.—PRELIMINARY.

1. This Act may be cited as the "Service and Execution of Process Act 1901" and is divided into Parts as follows:—

PART I.—PRELIMINARY—ss. 1–3.

PART II.—SERVICE OF PROCESS.

SERVICE OF WRITS OF SUMMONS—ss. 4–13.

SERVICE OF OTHER PROCESS—ss. 14–16.

PROOF OF SERVICE—s. 17.

PART III.—EXECUTION OF WARRANTS, &c.—ss. 18, 19.

PART IV.—ENFORCEMENT OF JUDGMENTS—ss. 20–26.

PART V.—RULES AND REGULATIONS—ss. 27, 28.

SCHEDULES.

Repeal of Acts of
Federal Council.

2. (1) The Acts of the Federal Council of Australasia mentioned in the First Schedule hereto, so far as the same may be in force in any State, are hereby repealed.

(2) This repeal shall not affect any right, privilege, obligation, or liability acquired, accrued, or incurred under any Act so repealed, or affect any legal proceeding or remedy in respect of any such right, privilege, obligation, or liability; and any such legal proceeding or remedy may be instituted, continued, or enforced as if this Act had not been passed.

Definitions.

3. In this Act unless the contrary intention appears—

(a) "Suit" means any suit action or original proceeding between parties or *in rem*;

- (b) "Writ of summons" includes any writ or other mesne process by which a suit is commenced or of which the object is to require the appearance of any person against whom relief is sought in a suit or who is interested in resisting such relief ;
- (c) "Court" includes any Judge or Justice of the Peace acting judicially ;
- (d) "Court of Record" includes any Court which is required to keep a record of its proceedings ;
- (e) "Party" includes the Commonwealth or a State or any person suing or being sued on behalf of the Commonwealth or a State ;
- (f) "Plaintiff" includes the King or any person suing on behalf of the King and any party seeking relief in a suit against any other party ;
- (g) "Defendant" includes any party against whom relief is sought in a suit or who is required to attend the proceedings in an action as a party thereto ;
- (h) "Judgment" includes any judgment decree rule or order given or made by a Court in any suit whereby any sum of money is made payable or any person is required to do or not to do any act or thing other than the payment of money.

S. 3.

Writ of summons.—Includes a summons in Petty Sessions (in Victoria) : *Rex v. Panton, Ex parte Fallshaw*, (1902) 8 A.L.R. 172.

Court of Record.—Under section 65 of the Victorian Justices Act, 1890 (No. 1105) the clerk is required to keep a register to record the proceedings of the Court, so that in Victoria a Court of Petty Sessions becomes a Court of Record for the purposes of this Act : *Ibid.* *Quære*, if this be so with regard to Courts of Petty Sessions in N.S.W., under the Justices Act, 1902.

PART II.

SERVICE OF PROCESS.

Service of Writs of Summons.

4. (1) A writ of summons issued out of any Court of Record of a State or part of the Commonwealth may be served on the defendant in any other State or part of the Commonwealth.

(2) Such service may, subject to any Rules of Court which may be made under this Act, be effected in the same manner as if the writ were served on the defendant in the State or part of the Commonwealth in which the writ was issued.

Rules of Court.—See Rules 3, 4, 5, and 6 of 23rd of December, 1902 (*post*) ; p. 495. Cf. notes to ss. 15, 16 and 17 of the C.L.P. Act, 1899 (*ante*).

5. (1) Every writ of summons for service under this Act out of the State or part of the Commonwealth in which it was issued shall, in addition to any other indorsement or notice required by the law of such State or part of the Commonwealth, have indorsed thereon a notice to the following effect (that is to say) :—

"This summons [*or as the case may be*] is to be served out of the State [*or as the case may be*] of _____ and in the State [*or as the case may be*] of _____"

Writ of summons may be served in any part of the Commonwealth.

49 Vict. No. 3 (Fed. Council), s. 3. Mode of service.

Indorsement on writ for service outside State.

49 Vict. No. 3 (F.C.), s. 4.

S 6.

(2) Every such writ of summons to which, by the law of such State or part, an appearance is required to be entered, shall have indorsed thereon a notice to the following effect (that is to say):—

“Your appearance to this summons [*or as the case may be*] must give an address at some place within five miles of the office of the Court of at which address proceedings and notices for you may be left.”

(3) Every writ of summons for service under this Act shall also contain or have indorsed thereon or annexed thereto a short statement of the nature of the claim made or the relief sought by the plaintiff in the suit, and if the plaintiff sues in a representative capacity shall also state such capacity.

Effect where writ of summons not properly indorsed.

49 Vict. No. 3 (F.C.), s. 5.
15 & 16 Vict. c. 76, s. 20.

Concurrent writs may be issued.

Ibid. s. 22.

6. If a writ of summons or copy thereof does not bear all the indorsements hereby required it shall be ineffective for service under this Act.

7. A writ of summons for service out of the State or part of the Commonwealth in which it was issued may be issued as a concurrent writ with one for service within such State or part of the Commonwealth and shall in that case be marked as concurrent.

See C.L.P. Act, s. 11 (*ante*).

Time limited for appearance.

Ibid. (F.C.) c. 76, s. 6.

8. The time to be limited by the writ of summons for appearance being entered or made by the defendant shall be such as may be prescribed by the Rules of the Court out of which it is issued, but shall not be less than the following, that is to say:—

(a) If the writ is issued or is to be served in the State of Western Australia or in the Northern Territory of the State of South Australia—Forty-five days;

(b) In any other case—Thirty days.

Time for Appearance.—See R. 34 Reg. Gen. of 22nd December, 1902 (*ante*).

Appearance to state address for service.

49 Vict. No. 3 (F.C.), s. 7.
15 & 16 Vict. c. 76, s. 30.

9. (1) Every appearance entered by or on behalf of a defendant to a writ of summons served on him under this Act shall give an address at some place within five miles of the office of the Court out of which the writ was issued, at which address all proceedings and notices may be left for him.

(2) If such address is not given or is fictitious or illusory the appearance may be set aside as irregular.

See under the C.L.P. Act, 1899, s. 28 of that Act and RR. 394 *et seq.*, Reg. Gen. of 22nd December, 1902 (*ante*).

Order for plaintiff to give security for costs.

10. Any defendant who has been served under this Act with a writ of summons may apply to the Court out of which the writ was issued, or a Judge thereof, for an order compelling the plaintiff to give security for costs, and upon such application the Court or Judge may make the order.

Security for Costs.—See Security for Costs, p. 153 (*ante*).

This section does not entitle a defendant who has been served with a writ issued in a State other than that in which he resides, to obtain as of course an order for security

for costs. Such an order is discretionary : *Ramsay v. Eager*, (1902) 8 A.L.R. 44. The section is to be interpreted in accordance with the Common Law Rule that the poverty of a plaintiff is not by itself a ground for ordering security for costs : *Evans v. Sneddon*, (1902) 8 A.L.R. 215.

Security for costs when ordered under this section is not to be limited to an amount based upon the difference between the expense to the defendant of defending the action in the State wherein the plaintiff sues and the expense to the defendant in defending in the State wherein the defendant resides : *Ibid*.

S. 10.

11. (1) When no appearance is entered or made by a defendant to a writ of summons served on him under this Act, if it is made to appear to the Court from which the writ was issued or a Judge thereof—

Proceedings where no appearance entered.

See 15 & 16 Vict. c. 76, s. 18. *Ibid*. (F.C.) s. 8.

(a) that the subject-matter of the suit so far as it concerns such defendant is—

(1) land or other property situate or being within the State or part of the Commonwealth in which the writ was issued ; or

(2) shares or stock of a corporation or company having its principal place of business within that State or part ; or

(3) any deed, will, document, or thing affecting any such land, shares, stock, or property ; or

(b) that any contract in respect of which relief is sought in the suit against such defendant by way of enforcing, rescinding, dissolving, annulling, or otherwise affecting such contract, or by way of recovering damages or other remedy against such defendant for a breach thereof, was made or entered into within that State or part ; or

(c) that the relief sought against the defendant is in respect of a breach, within that State or part, of a contract wherever made ; or

(d) that any act or thing sought to be restrained or removed, or for which damages are sought to be recovered, was done or is to be done or is situate within that State or part ; or

(e) that at the time when the liability sought to be enforced against the defendant arose he was within that State or part ; or

(f) that the domicile of the person against whom any relief is sought in a Matrimonial cause is within that State or part ;

and if it is also made to appear to such Court or Judge—

(g) that the writ was personally served on the defendant ; or in the case of a corporation served on its principal officer or manager or secretary within the State or part in which service is effected ; or

(h) that reasonable efforts were made to effect personal service thereof on the defendant, and that it came to his knowledge or in the case of a corporation that it came to the knowledge of such officer as aforesaid (in which case it shall be deemed to have been served on the defendant) ;

such Court or Judge may on the application of the plaintiff order

- S. 11.** from time to time that the plaintiff shall be at liberty to proceed in the suit in such manner and subject to such conditions as such Court or Judge may deem fit, and thereupon the plaintiff may proceed in the suit against such defendant accordingly.

(2) Any such order may be rescinded or set aside or amended on the application of the defendant.

Compare C.L.P. Act, 1899, s. 18 (*ante*) ; see that section and notes.

Matrimonial Cause.—**SERVICE.**—Upon an application under the section for leave to proceed in a matrimonial cause against a respondent resident in another State, satisfactory proof of service in accordance with the established practice of the Court must be furnished by the petitioner as a condition precedent to the granting of such leave. The proof required should be given at the time of making the application once for all, and may be furnished by affidavits of the same kind, according to circumstances, as the Court has been in the practice of acting upon in divorce suits where it has allowed proof of service on a respondent out of the jurisdiction to be given by affidavit : *Cecil v. Cecil*, (1902) 8 A.L.R. 204.

Effect of judgment.

49 Vict. No. 3 (F.C.), s. 11.

- 12.** When a judgment is given or made against a defendant who has been served with a writ of summons under this Act, such judgment shall have the same force and effect as if the writ had been served on the defendant in the State or part of the Commonwealth in which the writ was issued.

No increased jurisdiction conferred by this Part.

- 13.** This Part of this Act does not confer on any Court jurisdiction to hear or determine any suit which it would not have jurisdiction to hear and determine if the writ of summons had been served within the State or part of the Commonwealth in which the writ was issued.

SERVICE OF OTHER PROCESS.

Process may be served in any part of the Commonwealth.

- 14.** (1) When, in any suit in a Court of Record of a State or part of the Commonwealth, any writ (other than a writ of summons) notice decree or other process is required to be served on any party or person, such writ notice decree or process may be served on such party or person in any other State or part of the Commonwealth.

Mode of service.

- (2) Such service may, subject to any Rules of Court which may be made under this Act, be effected in the same way, and shall have the same force and effect, as if the service were effected in the State or part of the Commonwealth in which the writ notice decree or process was issued.

- (3) Thereupon all such proceedings may be taken as if the writ, notice, decree, or process had been served in the State or part of the Commonwealth in which it was issued.

Rules of Court.—See Rules 3, 4, 5 and 6 of Rules of 23rd of December, 1902 (*post*), p. 495.

Summons for offence may be served in any part of the Commonwealth.

- 15.** (1) When a summons has been issued on information upon oath by any Court or Judge or Police, Stipendiary, or Special Magistrate having jurisdiction in any State or part of a State or part of the Commonwealth, commanding any person who is charged with any offence alleged to have been committed in such State or part, whether such offence is punishable by indictment or upon summary conviction, to appear to answer to such charge or to be dealt with according to law, such summons may be served on such person in any other State or part of the Commonwealth.

8. 18.

(2) Such service may, subject to any Rules of Court or regulations which may be made under this Act, be effected in the same way, and shall have the same force and effect, as if the summons had been served in the State or part of the Commonwealth in which it was issued.

(3) If such person fails to appear at the time and place mentioned in such summons, and it appears to such Court, Judge, or Magistrate that the summons was duly served on the defendant a sufficient time before the day appointed for the hearing, all such proceedings may be taken as if the summons had been served in the State or part of the Commonwealth in which it was issued.

16. (1) When a subpoena or summons has been issued by any Court or Judge, or Police, Stipendiary, or Special Magistrate in any State or part of the Commonwealth, requiring any person to appear and give evidence in any civil or criminal trial or proceeding, such subpoena or summons may upon proof that the testimony of such person is necessary in the interests of justice by leave of such Court Judge or Magistrate on such terms as the Court Judge or Magistrate may impose be served on such person in any other State or part of the Commonwealth.

Subpoena or summons to witness may be served in another State by leave of a Judge.

(2) If such person fails to attend at the time and place mentioned in such subpoena or summons, such Court Judge or Magistrate or any other Police, Stipendiary, or Special Magistrate having jurisdiction in the State or part of the State or part of the Commonwealth in which the subpoena or summons was issued may on proof that the subpoena or summons was duly served on such person, and that a reasonable sum was tendered to him for his expenses issue such warrant for the apprehension of such person as such Court Judge or Magistrate might have issued if the subpoena or summons had been served in the State or part of the Commonwealth in which it was issued.

(3) Such warrant may be executed in such other State or part of the Commonwealth in the manner provided in this Act in the case of warrants issued for the apprehension of persons charged with an offence.

PROOF OF SERVICE.

17. When any writ notice decree or other process has under the provisions of this Act been served out of the State or part of the Commonwealth in which it was issued such service may be proved—

Mode of proof of service.

- (a) by affidavit sworn before any Justice of the Peace having jurisdiction in the State or part of the State or part of the Commonwealth in which such service was effected, or before a Commissioner for Affidavits or Declarations, or Notary Public for that State or part; or
- (b) in any manner in which such service might have been proved if it had been effected within the State or part of the Commonwealth in which the writ notice decree or process was issued.

Service may be Proved.—An affidavit of service of a summons on a defendant resident in another State, purporting on its face to have been sworn before a Justice

- §. 18.** of the Peace of such State, is *prima facie* evidence of service in proceedings, in Courts of Petty Sessions in Victoria, under the jurisdiction conferred by this Act: *Rex v. Panton*, (1902) 8 A.L.R. 172.

And see the (Commonwealth) State Laws and Records Recognition Act, 1901, s. 5 (*ante*), p. 480.

PART III.

EXECUTION OF WARRANTS, ETC.

Warrants may be backed for execution in another State.
11 & 12 Vict.
c. 42, s. 11.

18. (1) When a warrant has been issued by any Court or Judge or any Justice of the Peace having jurisdiction in any State or part of a State or part of the Commonwealth, for the apprehension of any person—

- (a) who is charged with any offence alleged to have been committed within such State or part, whether such offence is indictable or punishable upon summary conviction; or
- (b) against whom an indictment for any such offence has been found or presented,
- (c) against whom an order for the maintenance of his wife or children has been made,

any Justice of the Peace having jurisdiction in any other State or part of a State or part of the Commonwealth in which such person is or is supposed to be may on being satisfied that the warrant was issued by such Court or Judge or in the case of a warrant issued by a Justice of the Peace, upon proof on oath of the signature of the Justice issuing the warrant, make an indorsement on the warrant authorizing the execution thereof within such other State or part.

(2) Such indorsement may be in the form or to the effect of the Second Schedule hereto, and shall be sufficient authority to the person bringing the warrant, and also to all constables and persons to whom the warrant was originally directed, and also to all constables or other peace officers in such other State or part, to execute the warrant in such other State or part and to apprehend the person against whom the warrant was issued, and to bring him before a Justice of the Peace having jurisdiction in the State or part of the State or part of the Commonwealth in which the person was apprehended.

(3) Such Justice of the Peace may—

- (a) Order the person to be returned to the State or part of the Commonwealth in which the warrant was issued, and for that purpose to be delivered into the custody of the person bringing the warrant, or of the constables and persons to whom the warrant was originally directed or any of them; which order may be made by warrant under the hand of such Justice of the Peace, and may be executed according to its tenor; or
- (b) admit the person to bail, on such recognizances as he thinks fit, conditioned to appear and answer the charge at an appointed time and place in the State or part of the Commonwealth in which the warrant was issued.

(4) Such Justice of the Peace shall for the purposes of this section have the same power to remand the person and admit him to bail as he has in the case of persons apprehended under warrants issued by him ; and if it be made to appear to him or to any Judge of the State that the charge is of a trivial nature, or that the application for return has not been made in good faith in the interests of justice, or that for any reason it would be unjust or oppressive to return the person either at all or until the expiration of a certain period, the Justice or Judge may discharge the person either absolutely or on bail, or order that he shall be returned after the expiration of the period named in the order, or may make such other order as he thinks just.

§. 18.

See R. 7 Reg. Gen. of 23rd December, 1902 (*post*), p. 496.

19. (1) When a writ of attachment has been issued against any person by a Court of Record of a State or a Judge thereof for a contempt of the Court or disobedience of an order thereof, such writ may—

Writ of attachment may be executed in another State.

- (a) by leave of a Justice of the High Court be executed in any other State or part of the Commonwealth ; or
- (b) by leave of a Judge of the Supreme Court of any other State be executed in such other State.

(2) Such leave shall be indorsed on the writ, and shall be sufficient authority to the Marshal and also to the Sheriff of the State or part of a State in which the writ was issued, and also to the Sheriff of the State or part of a State in which the writ is to be executed, and to all other officers named in such indorsement, to apprehend such person and bring him before the Court out of which such writ was issued.

See R. 20 Reg. Gen. of 23rd December, 1902 (*post*), p. 497.

PART IV.

ENFORCEMENT OF JUDGMENTS.

20. Any person in whose favour a judgment is given or made, whether before or after the commencement of this Act, in a suit by any Court of Record of any State or part of the Commonwealth, may obtain from the prothonotary or registrar or other proper officer of such Court a certificate of such judgment in the form and containing the particulars set forth in the Third Schedule hereto or as near thereto as the circumstances will permit, which certificate such officer is hereby required to grant under his hand and the seal of such Court.

Certificate of judgment.
49 Vict. No. 4 (F.C.) s. 4.

A copy of the certificate when obtained must be filed : R. 2, additional Reg. Gen. of 23rd December, 1902 (*post*), and the other RR. 3-8 (*post*), p. 499.

Compare the decisions under s. 7 of the Inter-State Debts Recovery Act, 1901, (*ante*).

As to the title of affidavits and proceedings under this Part, see R. 21 ; and as to costs, R. 24 (*post*), p. 497.

21.. (1) Upon production of such certificate—

- (a) to the prothonotary, registrar, or other proper officer of any Court of like jurisdiction in any other State or part of the Commonwealth ; or

Registration of judgments and proceedings thereunder.
49 Vict. No. 4 (F.C.), s. 5.

8. 21.

(b) if there is no Court of like jurisdiction in such other State or part, to the registrar or other proper officer of a District or County Court or other inferior Court of Record having civil jurisdiction in such State or part, such officer shall forthwith register the same by entering the particulars thereof in a book to be kept by such officer and to be called "The Australian Register of Judgments."

(2) From the date of such registration such certificate shall become and be a record of such Court, and shall have the same force and effect in all respects as a judgment of such Court, and the like proceedings may be taken upon such certificate as if the judgment had been a judgment of such Court.

(3) No certificate of a judgment shall be so registered after the lapse of twelve months from the date of the judgment, unless leave in that behalf has first been obtained from the Court in which the certificate is proposed to be registered or from a Judge thereof.

Register.—See R. 9 Reg. Gen. of 23rd December, 1902 (*post*).

A certified copy of the certificate may be issued, R. 14, p. 496.

The certificate must be filed before registration, R. 11 (*post*), p. 496.

As to title of affidavit and proceedings, sec. R. 21; and costs, R. 24 (*post*) p. 497.

Proceedings.—The proceedings referred to in this section must be something in the way of an execution of the judgment.

In *Re Richards, Ex parte Maloney*, (1902) 19 W.N. 152, *Walker, J.*, held the word "proceedings" was amply large enough to include the issue of a bankruptcy notice. In Victoria, however, Judge *Chomley*, in the case of *Bennett v. Cohen*, (1901) 7 A.L.R. C.N. 96, held that the expression did not include a fraud summons under the "Imprisonment of Fraudulent Debtors Act, 1890" (Victorian) (No. 1100).

Definition of Court for purposes of last preceding section.

22. For the purposes of the last preceding section any Court mentioned in any of the following sub-sections shall be deemed to be a Court of like jurisdiction with any other Court mentioned in such sub-section, namely:—

- (a) The Supreme Courts of the several States:
- (b) The Vice-Admiralty Courts in the States of New South Wales and Victoria, and the Supreme Court of any other State in its Admiralty jurisdiction:
- (c) District Courts and County Courts and any inferior Courts of Record having civil jurisdiction:
- (d) Small Debts Courts and Courts of Petty Sessions and any inferior Courts of Record having civil jurisdiction to hear and determine cases in a summary way.

Execution not to issue unless affidavit of liability filed.
49 Vic. No. 4.
(F.C.) s. 6.

23. No execution shall be issued or other proceedings taken upon such certificate unless an affidavit is first filed in the Court out of which it is intended to issue such execution or take such proceedings made by the person in whose favour the judgment was given or made or by some other person cognizant of the facts of the case, stating—

- (a) that the amount for which execution is proposed to be issued is actually due and unpaid; or
- (b) that an act ordered to be done remains undone; or

(c) that the person ordered to forbear from doing an act has disobeyed the order, S. 23.
and no execution shall be issued for a larger amount than that sworn to.

Affidavit—That the amount is actually due and unpaid.—A bankruptcy notice may be issued in this State, on a certificate obtained and registered in accordance with the provisions of this Act, of a judgment of the Supreme Court of another State, if an affidavit be first filed stating that the amount for which it is proposed to issue the bankruptcy notice is actually due and unpaid: *Re Richards, Ex parte Maloney*, (1902) 19 W.N. 152.

Proceedings must be taken within thirty days of filing the affidavit unless a Judge extends the time: R. 16 Reg. Gen. of 23rd December, 1902 (*post*), p. 496. Proceedings taken must be notified to the proper officer of the Court in which the certificate is registered, and he must note them in the Register: RR. 17-19 (*post*), p. 497.

Proceedings taken in a jurisdiction of the Court other than that in which the judgment is registered must be notified by the Registrar or other officer of the jurisdiction in which the proceedings are taken to the Registrar or other officer in the jurisdiction in which the judgment is registered: R. 15 (*post*).

24. The Court in which any such certificate of a judgment has been registered and the Judges thereof shall, in respect of execution upon the certificate and the enforcement of the judgment, have the same control and jurisdiction over the judgment as if the judgment were a judgment of such Court. Proceedings subject to the control of the Court.
49 Vict. No. 4 (F.C.), s. 7.

25. (1) The Court in which any such certificate of a judgment has been registered or a Judge thereof may, on the application of any person against whom the judgment has been given or made, order a stay of proceedings on such certificate. Stay of proceedings.

(2) Such order may be made on such terms as to giving security, or as to making application to the Court by which the judgment was given or made, to set aside the same, or otherwise, as to the Court or Judge may seem fit.

26. (1) When—

- (a) Any certificate of a judgment is registered in any Court ; Notification of proceedings upon certificate and of satisfaction of judgment.
 - or
 - (b) Any execution is issued or other proceedings are taken in any Court upon any such certificate ; or
 - (c) Satisfaction of the judgment either in whole or in part is entered in any Court upon any such certificate ;
- the Registrar or other proper officer of that Court shall forthwith notify the same in writing under the seal of the Court to the Registrar or other proper officer of the Court in which the judgment was given or made.

(2) When any judgment whereof a certificate has been registered in any Court has been satisfied in whole or in part, the Registrar or other proper officer of the Court in which the judgment was given or made shall forthwith, upon such satisfaction being made or notified as the case may be, enter such satisfaction upon the judgment and notify such satisfaction in writing under the seal of the Court to the Registrar or other proper officer of every other Court in which a certificate of the judgment has been registered, and such satisfaction shall thereupon be entered upon every such certificate.

See additional Reg. Gen. of 23rd December, 1902 (*post*), p. 499 ; and R. 13 Reg. Gen. 23rd December, 1902 (*post*), p. 496.

S. 27

PART V.

RULES AND REGULATIONS.

Judges of
Supreme Courts
may make
rules.

27. (1) The Judges of the Supreme Court of any State, or such of them as may make Rules of Court in other cases, may make Rules—

- (a) for prescribing the practice and procedure in connexion with the service of the process of the Courts of such State under this Act, and the execution and enforcement by such Courts of the process and judgments of the Courts of other States and parts of the Commonwealth ; and
- (b) for prescribing the fees to be paid in connexion with the service of the process of the Courts of such State under this Act, and the execution and enforcement by such Courts of the process and judgments of the Courts of other States and parts of the Commonwealth, and the costs to be allowed to any person upon enforcing any such judgment (which fees and costs may be recovered in the same manner as any money payable under the judgment).

(2) Until such rules have been made and as far as any made do not provide for the circumstances of any particular case the practice and procedure of the State in which the process is issued or in which the service is effected or the execution is enforced respectively shall apply as far as practicable.

See Rules (*post*), pp. 495–499.

Governor
General may
make regu-
lations.

28. (1) The Governor-General may make regulations for carrying out the provisions of this Act and in particular for further applying the provisions of this Act or any of them to the service of the process of the Courts of the territories of the Commonwealth, and for the execution and enforcement by such Courts of the process and judgments of the Courts of the States and of other parts of the Commonwealth.

(2) All such regulations shall be notified in the *Gazette*, and shall thereupon have the force of law.

(3) All such regulations shall be laid before both Houses of the Parliament within thirty days after the making thereof, if the Parliament be then sitting, and if not then within thirty days after the next meeting of the Parliament.

SCHEDULES.

FIRST SCHEDULE.

ACTS OF FEDERAL COUNCIL REPEALED.

Reference to Act.	Short Title.
49 Vic. No. 3	The Australasian Civil Process Act 1886
49 Vic. No. 4	The Australasian Judgments Act 1886
60 Vic. No. 2	The Australasian Testamentary Process Act 1897

SECOND SCHEDULE.

Sch. 2.

INDORSEMENT ON WARRANT.

Section 18.

State of Queens-
land* to wit. }

WHEREAS proof upon oath has this day been made before me that the name of J.S. subscribed to the within warrant is in the handwriting of the within-mentioned [Justice of the Peace of the State of New South Wales*], I hereby authorize W.T., who brings me this warrant, and all other persons to whom this warrant was originally directed or by whom it may be lawfully executed, and also all constables and other peace officers of the [State of Queensland*], to execute this warrant within the [State of Queensland*], and to bring the said A.B., if apprehended within the [State of Queensland*], before me or before some [Justice of the Peace of the State of Queensland*] to be dealt with according to law.

Given under my hand this day of , One thousand nine hundred and .

J.L.,

A Justice of the Peace of the [State of Queensland*].
*Or as the case may be.

THIRD SCHEDULE.

Section 20.

CERTIFICATE OF JUDGMENT.

IN the Court of

Title of suit and date of commencement.	Form or nature of suit.	Name and addition of party to whom payment is to be made, or in whose favour judgment is given or made.	Name and addition of party ordered to pay money, or to do or not to do any act.	Date of judgment.	Abstract of judgment stating amount (if any) ordered to be paid, and particulars of any act ordered to be done or not to be done.	Date of trial and amount of verdict if any.

I certify that this certificate correctly and fully sets forth the particulars of a judgment given in this Court, on the day of , in a suit wherein A.B. was plaintiff and C.D. was defendant [or as the case may be].

Dated this day of 19 .

L.M.

[Prothonotary, Registrar, or other proper officer.]

RULES OF COURT.

THE 23RD DAY OF DECEMBER, A.D. 1902.

IN pursuance of the powers vested in us under the Service and Execution of Process Act, 1901, we, the Judges of the Supreme Court of New South Wales, do order and direct as follows:—

PRELIMINARY.

Rules to apply to all Courts of Record.

1. These Rules, except where the subject-matter or context otherwise indicates or requires, shall apply to every Court of Record of New South Wales.

Interpretation.

2. In these Rules—

“The Act” means the Service and Execution of Process Act, 1901;

“Register” means the Australian Register of Judgments.

All expressions have the same meaning as the like expressions in the Act.

SERVICE OF PROCESS.

Proceedings may be served by any person.

3. Every writ, notice, decree, or process requiring service under the Act may be served by any person.

R. 4.*Original need not be produced unless demanded.*

4. In cases where service of any writ, notice, decree, or process is effected by the delivery of a copy thereof, it shall not be necessary to the regular service of such writ, notice, decree, or process that the original should be shown, unless sight thereof is demanded.

Indorsement of date, &c.

5. The person serving any writ, notice, decree, or process shall, within three days after such service, indorse thereon (or upon a copy thereof where service is effected by delivery of the original) the day of the month and week of such service, and the name or description of the person upon whom such writ, notice, decree, or process was served.

Affidavit of service.

6. Every affidavit of service shall mention the day on which such indorsement was made.

EXECUTION OF WARRANTS.*Person arrested on warrant to have time to apply for discharge, &c.*

7. When any person has been apprehended under section 18 of the Act, and a Justice of the Peace orders him to be returned to the State or part of the Commonwealth in which the warrant was issued, such Justice shall, if so required by such person, make such order respecting the time when such person is to be so returned as in the opinion of such Justice will allow such person reasonable opportunity to apply under the said section to a Judge of the State for his discharge or for such other order as such Judge may think fit.

Order may be made by Judge.

8. A Judge may on application *ex parte* by or on behalf of such person make a like order.

ENFORCEMENT OF JUDGMENTS.*Register in each jurisdiction of Supreme Court.*

9. A book, to be called "The Australian Register of Judgments," shall be kept by the Prothonotary of the Supreme Court, and also by the Master in Equity and by the Registrar in every other jurisdiction of the said Court. Such book shall be in the Form No. 1 contained in the First Schedule hereto.

Register in inferior Courts.

10. A like book shall be kept by the Registrar of every District Court and by the officer in charge of the records of every other inferior Court of Record having civil jurisdiction in the State.

Certificate to be filed.

11. Every certificate of a judgment shall be filed before the same is registered.

Registration to be noted on Certificate.

12. The officer registering any certificate shall note thereon the date of such registration and the registration number.

Notices to be filed.

13. When any notification is made under section 26 of the Act, a copy thereof shall be filed.

Certified copy of certificate registered in any jurisdiction.

14. Any person having registered a certificate of a judgment in any jurisdiction of the Supreme Court may obtain from the proper officer thereof a copy of such certificate, certified under the hand of such officer and the office seal. The said copy shall have the same force and effect as a certified copy of a judgment of the said Court.

Notification of proceedings in other jurisdictions.

15. Where a certificate of a judgment has been registered in any jurisdiction of the Supreme Court, and proceedings are taken thereupon in any other jurisdiction of the said Court, the Registrar or other proper officer in such other jurisdiction shall forthwith notify the same in writing to the Registrar or other proper officer in the jurisdiction in which such certificate has been registered. The like notification shall be given of the result of such proceedings.

Affidavit of liability.

16. No execution shall be issued or other proceedings taken upon a certificate registered in any Court unless such execution is issued or such proceedings are commenced within thirty days next after the making of the affidavit required by section 23 of the Act, or within such further time as the Court or a Judge thereof may order. Such order may be made *ex parte*.

Notification of proceedings.

17. Every person on whose behalf execution is issued or other proceedings are taken upon any such certificate shall forthwith notify the same in writing to the Registrar or other proper officer of the Court in which such certificate is registered. He shall also give the like notification of the result of such execution or proceedings.

18. Every officer or person charged with the execution of any writ or other proceeding issuing out of any Court for the execution or enforcement of any judgment registered under the Act shall notify in writing to the Prothonotary, registrar, or proper officer of such Court the result of such execution or proceeding.

Proceedings, notifications, &c., to be noted in Register.

19. When any execution is issued or other proceedings are taken, or satisfaction is entered, or any notification is given or received relating to any certificate registered under the Act, a note thereof shall be entered in the Register.

EXECUTION OF WRITS OF ATTACHMENT.

Applications to be upon affidavit.

20. Every application for leave to execute a writ of attachment under section 19 of the Act shall be made upon affidavit of the facts. Such leave may be granted *ex parte* if the Judge thinks fit.

FORMS.

Title of proceedings.

21. Every affidavit or other proceeding under Part IV of the Act may be intitled in Form No. 3 in the First Schedule hereto.

Forms in Schedule.

22. The forms in the First Schedule may be used with such alterations as the circumstances of the case may render necessary; but any variance therefrom, not being in matter of substance, shall not affect the validity or regularity of the proceedings.

FEEs AND COSTS.

Fees.

23. The fees to be paid in connection with the service of the process of the Courts of this State under the Act, and the execution and enforcement by such Courts of the process and judgments of the Courts of other States and parts of the Commonwealth, shall be those set forth in the Second Schedule hereto.

Costs.

24. Where proceedings are taken to enforce any judgment, a certificate of which has been registered under the Act in any Court, the same costs shall be allowed as upon similar proceedings to enforce a like judgment of such Court.

M. H. STEPHEN, A.C.J.
WM. OWEN, J.
H. E. COHEN, J.
ROBERT D. PRING, J.

FIRST SCHEDULE.

No. 1.

Australian Register of Judgments.

Registration Number in this Court	
Title of suit and date of commencement	
Name and addition of party to whom payment is to be made, or in whose favour judgment is given or made	
Name and addition of party ordered to pay money, or to do or not to do any act	
Date of judgment	
Abstract of judgment, stating amount (if any) ordered to be paid, and particulars of any act ordered to be done or not to be done	
Date of trial and amount of verdict, if any	
Date of certificate	
From what Court received	
Date of registration in this Court	
Date of notification of registration	

Subsequent proceedings, notifications to and from other Courts, &c.

RR. Sch. 1.

No. 2.

Notice under Section 26 (1).

NEW SOUTH WALES.

In the Supreme Court
of New South Wales.
[or as the case may be.]

Court in which judgment given.	Title of Suit and date of commencement.	Date of Judgment.	Date of Certificate.	Registration number in this Court.

A Certificate of the above judgment has this day been registered in the Australian Register of Judgments in this Court; or,

A writ of *fiery facias* has this day issued been out of this Court upon the above judgment indorsed to levy £ ; or,

Satisfaction of the above judgment [as to £ part thereof] has this day been entered upon the Certificate thereof in this Court; or,

The notice, a copy of which is hereunto annexed, has this day been filed in this Court;

[or as the case may be].

Dated this day of , A.D. 19 .
To the Registrar of the Court of

Prothonotary (L.S.)

No. 3.

General title of proceedings.

In the Supreme Court
of New South Wales.
[or as the case may be.]

Australian Register of Judgments, No. of 19 .
A.B. v. C.D.

[as the title is entered in Register].

SECOND SCHEDULE.

A. Fees to be paid in connection with the service of process of the Courts of this State. For service of any process issued out of the Courts of New South Wales, and served in any of the other States the following fees shall be allowed.

- (a) If served by an officer of any Court the same amount as would be paid in accordance with the scale of fees in force for the time being, in the Court whereof such person is an officer, for the service of process issued out of such Court.
- (b) If there is no such scale of fees, or if the process is served by any other person, the amount actually paid to such person in respect of,—
 - (i.) the fee paid for swearing the affidavit of service;
 - (ii.) reasonable and necessary expenses of travelling and sustenance; and
 - (iii.) a fee of 7s. 6d., with an additional 7s. 6d. for each day necessarily occupied after the first day.

When more than one attendance is necessary but can be made on the same day, no additional allowance is to be made.

Where it is necessary to employ a solicitor to effect such service, in addition to the above allowances, a sum of 21s.

B. Fees to be paid in connection with the execution and enforcement by Courts of this State of the process and judgments of the Courts of other States and parts of the Commonwealth.

The same fees of Court shall be charged in connection with the execution

and enforcement of such process and judgments as are charged for the like or analogous proceedings to execute and enforce the process and judgments of Courts of this State; and in addition thereto the following fees :— **RR. Sch. 2.**

Where a certificate of judgment is registered and recorded as a judgment of the Supreme Court	s.	d.
.. .. .	10	0
If registered in any District Court	5	0
If registered in any other Court	2	6
For every notification to a Court of another State if sent from the Supreme Court	2	6
If sent from any District Court	1	6
If sent from any other Court	1	0
For entering satisfaction of any judgment so registered and recorded,—		
If in the Supreme Court	2	6
If in any District Court	1	6
If in any other Court	1	0

No fee shall, however, be charged for entering satisfaction of any judgment when entered in pursuance of a notification received from the Court of another State.

In the Supreme Court of }
New South Wales. }

REGULÆ GENERALES.

The 23rd day of December, A.D. 1902.

In pursuance of the powers vested in us, we order and direct as follows :—

1. In these Rules—

“ The Act ” means the Commonwealth Service and Execution of Process Act, 1901.

“ Prothonotary ” includes master or registrar.

All expressions have the same meaning as the like expressions in the Act.

Interpretation.

2. Every person obtaining a certificate of judgment under section 20 of the Act shall thereupon file a copy thereof.

Certificates to be filed.

3. The officer supplying such certificate shall thereupon enter in the judgment book a note thereof.

Certificates to be noted in judgment book.

4. Every notification received from any Court of another State or part of the Commonwealth with respect to such certificate shall be filed with the papers in the cause, and a note thereof entered in the judgment book.

Notifications to be filed.

5. When—

(a) Any certificate of a judgment of the Court has been registered in any Court of another State or part of the Commonwealth, and

(b) Any execution is issued or other proceedings are taken in any jurisdiction of the Court upon the said judgment,

Notification of execution, &c., to other Courts.

the prothonotary shall forthwith notify the same in writing under the seal of the Court to the Register or other proper officer of the Court in which such certificate has been registered. He shall also give the like notification of the result of such execution or proceedings.

6. Such notification, or any notification under section 26 (2) of the Act, may be in the form in the Schedule hereto, or to the like effect, with such alterations as the circumstances of the case may render necessary. **Form.**

7. Every person on whose behalf execution is issued or other proceedings are taken upon any such judgment shall forthwith notify the same in writing to the prothonotary.

Notification of execution, &c., to prothonotary.

8. Every such person, and every officer or person charged with such execution or other proceedings shall forthwith notify to the prothonotary the result of such execution or proceedings.

Notification of result of execution, &c.

M. H. STEPHEN, A.C.J.

WM. OWEN, J.

H. E. COHEN, J.

ROBERT D. PRING, J.

R. Sch. 2.

SCHEDULE.

In the Supreme Court of }
New South Wales, }

Title of Suit.	Date of Commencement.	Date of Judgment.

The above judgment [or Notice has been received from the Registrar of the Court of that the above judgment] has been satisfied [as to £ part thereof]. Please enter such satisfaction upon the certificate of the said judgment registered in your Court.

Dated this day of 19 .

To the Registrar of {
the Court }

Prothonotary (L.S.)

THE
CHARTER OF JUSTICE :

AND SOME SECTIONS OF THE

ENGLISH ACT, 9 GEO. IV., c. 83.

CHARTER OF JUSTICE.

(The Imperial Act 4 Geo. IV, c. 96, authorised the King by Charters or letters patent under the Great Seal to erect and establish Courts of judicature in New South Wales and Van Diemen's Land, to be styled "The Supreme Court of New South Wales" and "The Supreme Court of Van Diemen's Land" respectively. Accordingly by letters patent known as the CHARTER OF JUSTICE, dated the 13th of October, 1823, His Majesty granted, directed, ordained and appointed that there should be within that part of the Colony of New South Wales situate in the island of New Holland, a Court which should be called "The Supreme Court of New South Wales," and the said Court was thereby created directed and constituted a Court of Record. It has been thought useful to print here some of the clauses of the Charter.)

GEORGE THE FOURTH, by the Grace of God, of the United Kingdom of Great Britain and Ireland, King, Defender of the Faith, &c., &c., &c.

TO ALL TO WHOM THESE PRESENTS SHALL COME,—

GREETING :—

WHEREAS, by an Act passed in the Fourth Year of our Reign, intituled, "*An Act to provide, until the First Day of July, 1827, and until the End of the next Session of Parliament, for the better Administration of Justice in New South Wales and Van Diemen's Land, and for the more effectual Government thereof, and for other purposes relating thereto,*" it was enacted, That it should be lawful for Us, Our Heirs or Successors, by Charters or Letters Patent, under the Great Seal of Our United Kingdom of Great Britain and Ireland, to erect and establish Courts of Judicature in New South Wales and Van Diemen's Land respectively, which should be styled "*The Supreme Court of New South Wales*" and "*The Supreme Court of Van Diemen's Land*"; and that each of such Courts respectively should be holden by one Judge, or Chief Justice, and should have such Ministerial or other Officers as should be necessary for the Administration of Justice in the said Courts respectively, and for the Execution of the Judgments, Decrees, Orders, and Process thereof: And it was enacted, That the said Judges should, from Time to Time, be appointed by Us, Our Heirs and Successors; and that the said Ministerial, and other Officers of the said Courts respectively, should from time to time, be appointed to, and removed from, their respective Offices, in such Manner as We, Our Heirs and Successors, should, by such Charters or Letters Patent as aforesaid, direct; and that the said Judges should be respectively entitled to receive such reasonable Salaries as We, Our Heirs and Successors, should approve and direct; which Salaries should be in lieu of all Fees or other Emoluments whatsoever:—Now know ye, that We, upon full Consideration of the Premises, and

of Our especial Grace, certain Knowledge, and mere Motion, have, in pursuance of the said Act of Parliament, thought fit to grant, direct, ordain and appoint, and by these Presents do accordingly for Us, Our Heirs and Successors, grant, direct, ordain, and appoint, that there shall be within that Part of Our Colony of New South Wales, situate in the Island of New Holland, a Court, which shall be called "*The Supreme Court of New South Wales*"; and We do hereby create, direct, and constitute the said Supreme Court of New South Wales a Court of Record.

II. And We do further will, ordain, and appoint, that the said Supreme Court of New South Wales shall consist of, and be holden by and before one Judge, who shall be and be called the Chief Justice of the Supreme Court of New South Wales; which Chief Justice shall be a Barrister in England or Ireland of not less than Five Years Standing, to be named and appointed, from Time to Time, by Us, Our Heirs and Successors, by Letters Patent under Our and Their Great Seal of the United Kingdom of Great Britain and Ireland; and such Chief Justice shall hold his Office during the pleasure of Us, Our Heirs and Successors, and not otherwise.

III. And We do hereby give and grant to Our said Chief Justice Rank and Precedence above and before all Our Subjects whomsoever within the Colony of New South Wales aforesaid, and the Islands, Territories, and Places dependent thereupon, excepting the Governor, or Acting Governor for the Time-being of the said Colony, and excepting all such persons as by Law or Usage take Place in England before Our Chief Justice of Our Court of King's Bench.

IV. And We do further grant, ordain, and appoint, that the said Supreme Court of New South Wales shall have and use, as Occasion may require, a Seal, bearing a device and Impression of Our Royal Arms, within an Exergue or Label surrounding the same, with this inscription—" *The Seal of the Supreme Court of New South Wales.*" And We do hereby grant, ordain, and appoint, that the said Seal shall be delivered to, and kept in the Custody of, the said Chief Justice.

V. (Salary of Chief Justice.)

VI. (Salary of Chief Justice.)

VII. (Chief Justice to hold no other office on pain of forfeiture.)

VIII. And We do hereby constitute and appoint Our trusty and well-beloved FRANCIS FORBES, Esquire, to be the first Chief Justice of the said Supreme Court at New South Wales, the said FRANCIS FORBES being a Barrister in England of Five Years Standing, and upwards.

IX. And We do hereby ordain, appoint, and declare, that there shall be and belong to the said Court the following Officers; that is to say, a Registrar, a Prothonotary, a Master, and a Keeper of Records, and such and so many other Officers as to the Chief Justice of the said Court for the Time-being shall, from Time to

Time, appear to be necessary for the Administration of Justice, and the due Execution of all the Powers and Authorities which are granted and committed to the said Court by these Our Letters Patent. Provided nevertheless, that no new Office shall be created in the said Court, unless the Governor, or Acting Governor for the Time-being of Our said Colony, shall first signify his Approbation thereof to Our said Chief Justice for the Time-being, in Writing, under the Hand of such Governor, or Acting Governor as aforesaid; and We do further ordain and direct, that all Persons, who shall and may be appointed to the several Offices of Master, Registrar, Prothonotary, or Keeper of Records of the said Supreme Court of New South Wales, or to any Offices in the said Court whereof the Duties shall correspond to those performed by the Master, Registrar, Prothonotary, or Keeper of Records of any or either of Our Courts of Record at Westminster, shall be so appointed by Us, Our Heirs and Successors, by Warrant under Our or Their Royal Sign Manual; and that all Persons, who shall and may be appointed to any other Office within the said Supreme Court of New South Wales, shall be so appointed by the Chief Justice for the Time-being of the said Court. And We do further direct and appoint, that the several Officers of the said Court, so to be appointed as aforesaid by Us, Our Heirs and Successors, shall hold their respective Offices during Our and Their Pleasure; and that the several Officers of the said Court so to be appointed as aforesaid by the Chief Justice thereof, be subject to be removed by the said Court from their Offices therein, upon reasonable cause.

X. And We do hereby authorize and empower the said Supreme Court of New South Wales to approve, admit, and enrol such and so many persons, having been admitted Barristers-at-Law or Advocates in Great Britain or Ireland, or having been admitted Writers, Attorneys, or Solicitors, in one of Our Courts at Westminster, Dublin, or Edinburgh, or having been admitted as Proctors in any Ecclesiastical Court in England, to act as well in the Character of Barristers and Advocates, as of Proctors, Attorneys, and Solicitors in the said Court; and which Persons, so approved, admitted, and enrolled as aforesaid, shall be, and are hereby authorized to appear, and plead, and act for the Suitors of the said Court, subject always to be removed by the said Court from their Station therein, upon reasonable Cause; and We do declare, that no other Person or Persons whatsoever shall be allowed to appear, and plead, or act, in the said Supreme Court of New South Wales, for and on behalf of such Suitors, or any of them. Provided always, and We ordain and declare, that in Case there shall not be a sufficient Number of such Barristers-at-Law, Advocates, Writers, Attorneys, Solicitors, and Proctors, within the said Colony, competent and willing to appear and act for the Suitors of the said Court, then and in that Case the said Supreme Court of New South Wales shall, and is hereby authorized to admit so many other fit and proper Persons to appear and act as Barristers, Advocates, Proctors, Attorneys, and Solicitors, as may be necessary, according to such general Rules and Qualifications as the said Court shall, for that Purpose, make and establish. Provided, that the said Court shall not admit any

Person to act in any or either of the Characters aforesaid, who hath been, by due Course of Law, convicted of any Crime, which, according to any Law now in force in England, would disqualify him from appearing and acting in any of Our Courts of Record at Westminster.

XI. And We do ordain and declare, that the Governor, or Acting Governor for the Time-being of the said Colony of New South Wales, shall yearly, on the first Monday in the Month of January in each year, by Warrant under his Hand and Seal, nominate and appoint some fit and proper Person to act as and be the Sheriff for Our said Colony of New South Wales and its Dependencies, other than and except the Island of Van Diemen's Land, for the Year ensuing ; which Sheriff, when appointed, shall, as soon as conveniently may be, and before he shall enter upon his said Office, take an Oath faithfully to execute his Office, and the Oath of Allegiance, before the Governor, or Acting Governor, who are hereby authorized to administer the same ; and such Sheriff shall continue in such his Office during the space of One whole Year, to be computed from the said first Monday in the Month of January, and until another shall be appointed and sworn into the said Office ; and, in case such Sheriff shall die in his Office, or depart from Our said Colony of New South Wales, then another Person shall, as soon as conveniently may be after the Death or Departure of such Sheriff, be in like Manner appointed and sworn in as aforesaid, and shall continue in his Office for the Remainder of the Year, and until another Sheriff shall be duly appointed and sworn into the said Office. And We do further order, direct, and appoint, that the said Sheriff and his Successors shall, by themselves or their sufficient Deputies, to be by them appointed and duly authorized under their respective Hands and Seals, and for whom he and they shall be responsible during his or their Continuance in such Office, execute, and the said Sheriff and his said Deputies are hereby authorized to execute all the Writs, Summonses, Rules, Orders, Warrants, Commands, and Process, of the said Supreme Court of New South Wales, and make return of the same, together with the Manner of the Execution thereof, to the Supreme Court of New South Wales ; and to receive and detain in Prison all such Persons as shall be committed to the Custody of such Sheriff by the said Supreme Court of New South Wales, or by the Chief Justice of the said Court. And We do further authorize Our Governor, or Acting Governor for the Time-being for the said Colony of New South Wales, to re-appoint the said Person to fill the Office of Sheriff from Year to Year, if it shall appear to Our said Governor, or Acting Governor, expedient so to do. So nevertheless that such Appointment shall be annually renewed, and be not ever made for more than one Year. Provided nevertheless, and We do hereby require Our said Governor, or Acting Governor of Our said Colony, in the Selection of any Person or Persons to fill the said Office of Sheriff of New South Wales, to conform himself to such Directions as may from Time to Time be given in that Behalf by Us, Our Heirs and Successors, through one of Our or their Principal Secretaries of State.

XII. And We do further direct, ordain, and appoint, that whenever the said Supreme Court of New South Wales shall direct or award any Process against the said Sheriff, or award any Process in any Cause, Matter, or Thing, wherein the said Sheriff, on Account of his being related to the Parties, or any of them, or by Reason of any good Cause of Challenge which would be allowed against any Sheriff in England, cannot, or ought not by Law, to execute the same ; in every such Case the said Supreme Court of New South Wales shall name and appoint some other fit Person to execute and return the same ; and the said Process shall be directed to the Person so to be named for that Purpose ; and the Cause of such special Proceedings shall be suggested, and entered on the Records of the said Court.

XIII. Provided always, and We do hereby ordain and declare, that the said Supreme Court of New South Wales shall fix certain Limits, beyond which the said Sheriff shall not be compelled or compellable to go in Person, or by his Officers or Deputies, for the Execution of any Process of the said Court ; and when the Process of the said Court shall be to be executed in any Place or Places beyond the Limits so to be fixed, We grant, ordain, and direct, that the said Supreme Court of New South Wales shall, upon Motion, direct by what Person or Persons, and in what Manner, such Process shall be executed, and the Terms and Conditions which the Party, at whose Instance the same shall be issued, shall enter into, in Order to prevent any improper Use of Abuse of the Process of the said Court. And the said Sheriff shall, and he is hereby required to grant his special Warrant, or Deputation, to such Person or Persons as the said Court shall direct, for the Execution of such Process : And, in that Case, We direct and declare, that the said Sheriff, his Executors or Administrators, shall not be responsible or liable for any Act to be done in, or in any way respecting the Execution of such Process, under and by Virtue of such Special Warrant ; And that any Person or Persons being aggrieved under, or by pretence of such Special Warrant, shall and may seek their Remedy under any Security which may have been directed to be taken upon the occasion, and which the said Court is hereby authorized to direct to be taken.

XIV. And Whereas, in the said Act of Parliament it is enacted, "That the said Courts shall have Cognizance of all Pleas, "Civil, Criminal, or mixed" ; and the jurisdiction of the said Courts, in all such Cases, is thereby settled and ascertained : And it is thereby enacted, "That the said Courts shall be Courts "of Ecclesiastical Jurisdiction, and shall have full Power and "Authority to administer and execute, within New South Wales "and Van Diemen's Land, and the Dependencies thereof, such "Ecclesiastical Jurisdiction and Authority as shall be committed "to the said Supreme Courts, by Our Charter or Letters Patent" ; Now We do hereby, for Us, Our Heirs and Successors, grant, ordain, establish, and appoint, that the said Supreme Court of New South Wales shall be a Court of Ecclesiastical Jurisdiction, with full power to grant Probates, under the Seal of the said Court, of the last Wills and Testaments of all or any of the Inhabitants of that Part of the said Colony, and its Dependencies,

situate in the Island of New Holland, and of all other Persons who shall die and leave personal effects within that part of the said Colony ; and to commit Letters of Administration, under the Seal of the said Court, of the Goods, Chattels, Credits, and all other Effects whatsoever, of the Persons aforesaid who shall die intestate, or who shall not have named an Executor resident within that Part of the said Colony and its Dependencies ; or where the Executor, being duly cited, shall not appear and sue forth such Probate, annexing the Will to the said Letters of Administration, when such Persons shall have left a Will without naming any Executor, or any Person for Executor, who shall then be alive and resident within that Part of the said Colony and its Dependencies, and who, being duly cited thereunto, will not appear and sue forth a Probate thereof ; and to sequester the Goods and Chattels, Credits, and other Effects whatsoever of such Persons so dying, in Cases allowed by law, as the same is and may be now used in the Diocese of London ; and to demand, require, take, hear, examine and allow, and, if Occasion require, to disallow and reject the Accounts of them, in such Manner and Form as is now used, or may be used, in the said Diocese of London, and to do all other Things whatsoever needful and necessary in that Behalf. Provided always, and We do hereby authorize and require the said Court, in such Cases as aforesaid, where Letters of Administration shall be committed with the Will annexed, for Want of an Executor applying in due Time to sue forth the Probate, to reserve in such Letters of Administration full Power and Authority to revoke the same, and to grant Probate of the said Will to such Executor whenever he shall duly appear and sue forth the same. And We do hereby further authorize and require the said Supreme Court of New South Wales to grant and commit such Letters of Administration to any one or more of the lawful next of Kin of such Person so dying as aforesaid, and being then resident within the jurisdiction of the said Court, and being of the Age of Twenty-one Years ; and in Case no such Person shall then be residing within the Jurisdiction of the said Court, or being duly cited shall not appear and pray the same, to the Registrar of the said Court, or to such Person or Persons, whether Creditor or Creditors or not of the deceased Person, as the Court shall see fit. Provided always, that Probates of Will, and Letters of Administration, to be granted by the said Court, shall be limited to such Money, Goods, Chattels, and Effects, as the deceased Person shall be entitled to within that Part of the said Colony situate within the Island of New Holland.

XV. And We do hereby further enjoin and require, that every Person to whom such Letters of Administration shall be committed shall, before the granting thereof, give sufficient Security by Bond, to be entered into to Us, Our Heirs and Successors, for the Payment of a competent sum of Money, with one, two, or more able Sureties, Respect being had in the sum therein to be contained, and in the Ability of the Sureties, to the Value of the Estates, Credits, and Effects of the deceased ; which Bond shall be deposited in the said Court, among the Records thereof, and there safely kept, and a Copy thereof shall be also recorded among

the Proceedings of the said Court, and the Condition of the said Bond shall be to the following Effect ;—“ That if the above-
“ bounden Administrator of the Goods, Chattels, and Effects
“ of the deceased, do make, or cause to be made, a true and per-
“ fect Inventory of all and singular the Goods, Credits, and Effects
“ of the said Deceased, which have or shall come to the Hands,
“ Possession, or Knowledge of him the said Administrator, or
“ to the Hands or Possession of any other Person or Persons
“ for him ; and the same so made, do exhibit, or cause to be ex-
“ hibited into the said Supreme Court of New South Wales, at
“ or before a Day therein to be specified ; and the same Goods,
“ Chattels, Credits and Effects, and all other the Goods, Chattels,
“ Credits and Effects of the Deceased at the Time of his Death,
“ or which, at any Time afterwards, shall come to the Hands or
“ Possession of such Administrator, or to the hands or Possession
“ of any other Person or Persons for him, shall well and truly
“ administer according to Law ; and further shall make, or cause
“ to be made, a true and just Account of his said Administration,
“ at or before a Time therein to be specified ; and afterwards,
“ from Time to Time, as he, she, or they, shall be lawfully re-
“ quired. And all the Rest and Residue of the said Goods, Chat-
“ tels, Credits, and Effects which shall be found, from Time to
“ Time, remaining upon the said Administration Accounts, the
“ same being first examined and allowed of by the said Supreme
“ Court of New South Wales, shall, and do pay and dispose of in
“ a due Course of Administration, or in such Manner as the said
“ Court shall direct :—Then this Obligation to be Void and of
“ Non-effect ; or else to be and remain in full Force and Virtue.”

XVI. And in Case it shall be necessary to put the said Bond in Suit, for the sake of obtaining the Effect thereof, for the Benefit of such Person or Persons as shall appear to the said Court to be interested therein, such Person or Persons, from Time to Time, giving satisfactory Security for paying all such Costs as shall arise from the said Suit, or any Part thereof, such Person or Persons shall, by Order of the said Court, be allowed to sue the same in the Name of the Attorney General, for the Time-being, of the said Colony ; and the said Bond shall not be sued in any other Manner. And We do hereby authorize and empower the said Court to order that the said Bond shall be put in Suit in the Name of the said Attorney General.

XVII. And We do further will, order, and require, that the said Court shall fix certain Periods, when all Persons, to whom Probates of Wills, and Letters of Administration shall be granted by the said Court, shall, from Time to Time, until the Effects of the deceased Person shall be fully administered, pass their Accounts relating thereto before the said Court ; and in Case the Effects of the Deceased shall not be fully administered within the Time for that Purpose to be fixed by the said Court, then, or at any earlier Time, if the said Court shall see fit so to direct, the Person or Persons to whom such Probate or Administration shall be granted, shall pay, deposit, and dispose of the Balance of Money, belonging to the Estate of the Deceased, then in his, her, or their Hands ; and all Money which shall afterwards come into his, her, or their Hands, and also all precious Stones, Jewels,

Bonds, Bills and Securities, belonging to the Estate of the Deceased, in such Manner, and unto such Persons, as the said Court shall direct, for safe Custody. And We require that the said Court shall, from Time to Time, make such Order as shall be just, for the due Administration of such Assets, and for the Payment or Remittance thereof, or any Part thereof, as Occasion shall require, to or for the Use of any Person or Persons, whether resident or not resident in the said Colony and its Dependencies, who may be entitled thereto, or any Part thereof, as Creditors, Legatees, or next of Kin, or by any other Right or Title whatsoever. And we further order and direct, that it shall be lawful for the said Court to allow to any Executor, or Administrator of the Effects of any deceased Person (except as herein mentioned), such Commission or Percentage out of their Assets, as shall be just and reasonable, for their Pains and Trouble therein. Provided always, that no Allowance whatever shall be made for the Pains and Troubles of any Executor or Administrator who shall neglect to pass his Accounts at such Time, or to dispose of any Money, Goods, Chattels, or Securities, with which he shall be chargeable, in such Manner as, in Pursuance of any general or special Rule, or Order of the said Court, shall be requisite. And moreover, every such Executor or Administrator, so neglecting to pass his Accounts, or to dispose of any such Money, Goods, Chattels, or Securities with which he shall be chargeable, shall be charged with Interest at the Rate then current within the said Colony and its Dependencies, for such Sum and Sums of Money, as, from Time to Time, shall have been in his Hands, whether he shall or shall not make Interest thereof.

XVIII. And We do hereby authorize the said Supreme Court of New South Wales to appoint Guardians, and Keepers of Infants and their Estates, according to the Order and Course observed in that Part of Our United Kingdom called England; and also Guardians, and Keepers of the Persons and Estates of Natural Fools, and of such as are or shall be deprived of their Understanding or Reason by the Act of God, so as to be unable to govern themselves and their Estates; which We hereby authorize and empower the said Court to inquire, hear, and determine, by Inspection of the Person, or such other Ways and Means by which the Truth may be best discovered and known.

XIX. (Appeal to Privy Council.)

XX. (Appeal to Privy Council.)

XXI. (Appeal to Privy Council.)

XXII. (Appeal to Privy Council.)

XXIII. And We do hereby strictly charge and command all Governors, Commanders, Magistrates, Ministers, Civil and Military, and all our liege Subjects within and belonging to the said Colony, that in the Execution of the several Powers, Jurisdictions, and Authorities hereby granted, made, given, or created, they be aiding and assisting and obedient in all Things as they will answer the contrary at their Peril.

XXIV. Provided always, that nothing in these Presents contained, or any Act which shall be done under the Authority thereof, shall extend or be construed to extend to prevent Us, Our Heirs and Successors, to repeal these Presents, or any Part thereof, or to make such further or other Provision by Letters Patent for the Administration of Justice, Civil and Criminal, within the said Colony, and the Places now or at any Time hereafter to be annexed thereto, as to Us, Our Heirs and Successors shall seem fit, in as full and ample a manner as if these Presents had not been made;—These Presents, or any Thing herein contained to the Contrary thereof, in any wise, notwithstanding.—In Witness whereof We have caused these Our Letters to be made Patent.

Witness Ourselves at Westminster, the Thirteenth Day of October, in the Fourth Year of Our Reign.

(BY WRIT OF PRIVY SEAL),

“ELDON.”

THE GREAT SEAL OF
GREAT BRITAIN.

ACT 9 GEO. IV., c. 83.

An Act to provide for the Administration of Justice in New South Wales and Van Diemen's Land and for the more effectual Government thereof and for other purposes relating thereto. [25 July, 1828.] 9 Geo. IV. c. 83.

* * * * *

The Act 4 Geo. IV, c. 96 (under the authority of which Act the Charter of Justice issued), was repealed by the Act 9 Geo. IV, c. 83, which re-enacted (s. 1) the authority to grant Charters or letters patent establishing Courts of judicature, but provided (s. 2) that until such Charters or letters patent should be issued, the Supreme Court instituted by the letters patent of the 13th of October, 1823 (the Charter of Justice) should retain and exercise the several jurisdictions and powers vested in it by such letters patent so far as the same might not be altered by this Act, and the said letters patent were declared to be of the same force and effect as if they had been issued by virtue and in pursuance of this Act. (Sections 3 and 24 are here inserted.)

* * * * *

3. And be it further enacted that the said Courts respectively shall be Courts of Record and shall have cognizance of all pleas civil criminal or mixed and jurisdiction in all cases whatsoever as fully and amply to all intents and purposes in New South Wales and Van Diemen's Land respectively and all and every the islands and territories which now are or hereafter may be subject to or dependent upon the respective Governments thereof as His Majesty's Courts of King's Bench Common Pleas and Exchequer at Westminster or either of them lawfully have or hath in England And the said Courts respectively shall also be at all times Courts of oyer and terminer and gaol delivery in and

Supreme
Courts to be
Courts of
record.

for New South Wales and Van Diemen's Land and the Dependencies thereof respectively and the said Judges so appointed shall have and exercise such and the like jurisdiction and authority in New South Wales and Van Diemen's Land and the Dependencies thereof respectively as the Judges of the Courts of King's Bench Common Pleas and Exchequer in England or any of them lawfully have and exercise and as shall be necessary for carrying into Effect the several jurisdictions powers and authorities committed to the said Courts respectively.

Laws of England
to be applied in
the administra-
tion of justice.

24. Provided also and be it further enacted that all laws and statutes in force within the realm of England at the time of the passing of this Act (not being inconsistent herewith or with any Charter or Letters Patent or Order in Council which may be issued in pursuance hereof) shall be applied in the administration of justice in the Courts of New South Wales and Van Diemen's Land respectively so far as the same can be applied within the said Colonies and as often as any doubt shall arise as to the application of any such laws or statutes in the said colonies respectively it shall be lawful for the Governors of the said colonies respectively by and with the advice of the Legislative Councils of the said colonies respectively by ordinances to be by them for that purpose made to declare whether such laws or statutes shall be deemed to extend to such colonies and to be in force within the same or to make and establish such limitations and modifications of any such laws and statutes within the said colonies respectively as may be deemed expedient in that behalf Provided always that in the meantime and before any such ordinances shall be actually made it shall be the duty of the said Supreme Courts as often as any such doubts shall arise upon the trial of any information or action or upon any other proceeding before them to adjudge and decide as to the application of any such laws or statutes in the said colonies respectively.

(The Act 9 Geo. IV, c. 83, was originally a temporary Act (s. 41). It was continued from time to time by successive statutes one of which, 2 & 3 Vic. c. 70, made it lawful for the local legislature to make such provision as to it might seem meet, for the better administration of justice and for defining the Constitution of the Courts of Law and Equity, and of juries within the Colony; and subsequently it was, together with the amending Act, made permanent by 5 & 6 Vic. c. 76, s. 53.

THE
COMMERCIAL CAUSES ACT
(1903)

AND

RULES THEREUNDER.

EDITED WITH NOTES

BY

T. ROLIN AND G. M. LONG INNES,
(Barristers-at-Law).

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1904.

COMMERCIAL CAUSES ACT. 1903.

ACT No. 19, 1903.

An Act to provide a more expeditious method for the trial of commercial causes; and for purposes consequent on or incidental to that object. [Assented to, 5th December, 1903.]

The English Practice in the Commercial Court is founded on a certain "notice" issued by the Judges of the Queen's Bench Division in England in the month of February, 1895. This "notice" may be found in the Annual Practice 1904, Vol. 2, p. 658; in Mathew's "Practice of the Commercial Court;" and in the Introduction to the first volume of the Commercial Cases, a series of reports of cases in the Commercial Court published at the "Times" office. This "notice" had no direct legislative authority; it has not even the force of a Rule of Court; it was merely "a practice agreed upon by the Judges of the Queen's Bench Division who have the right to deal by convention amongst themselves with the mode of disposing of the business of their Courts": see Annual Practice, *loc. cit.*; and per *Esher*, M.R., in *Barry v. Peruvian Corporation*, (1896) 1 Q.B. 209; 1 Com. Cas. 269.

The draughtsman of this Statute has to a great extent followed the provisions of the English notice: and the English practice under the notice in question will no doubt afford a guide to the practice which will be followed here under this Act. At the same time it must be remembered that the Court or Judge here has a statutory authority which is wanting in England.

BE it enacted by the King's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and Legislative Assembly of New South Wales in Parliament assembled, and by the authority of the same, as follows:—

Preliminary.

1. This Act may be cited as the "Commercial Causes Act, Short title. 1903."

2. In this Act, unless the context otherwise requires,—

Definitions.

"Judge" means a Judge of the Supreme Court.

"Prescribed" means prescribed by rules of Court.

S. 2. "Prothonotary" means the Prothonotary of the Supreme Court.

"Rules of court" includes forms.

Throughout the Act power is given to "a Judge" of the Supreme Court; it is understood that in the arrangement of business amongst themselves by the Judges, applications under this Act are to be made to Mr. Justice *Pring*.

Commercial
causes.

3. Commercial causes include causes arising out of the ordinary transactions of merchants and traders; amongst others those relating to the construction of mercantile documents, export or import of merchandise, affreightment, insurance, banking and mercantile agency and mercantile usages.

This section follows the first clause of the English "notice."

No exhaustive definition of commercial causes is attempted by the Act. The question will be one for the discretion of the Judge to whom the application under s. 5 to place the cause in the commercial cause list is made. A "commercial cause" has not been defined in the English Practice: see *Sea Insurance Co. v. Carr*, (1901) 1 Q.B. 7; 6 Com. Cas. 11. In that case the Court of Appeal held that the fact that a serious question of international law was involved was a reason for not trying the case in the Commercial Court. But a case on the same facts had already been tried there: *Francis Times & Co. v. Sea Insurance Co.*, 3 Com. Cas. 229. A question of fraud may be tried in the Commercial Court, as in *Herring v. Janson*, 1 Com. Cas. 177. In England, ordinary disputes as to retail transactions are not regarded as commercial causes.

The Reports of Commercial Cases may serve to show what have been regarded in England as commercial causes. They include a very wide variety of cases. Looking at the cases in the seventh volume for instance, they include action by shipowner against holder of bills of lading for freight; special case on an award in a dispute arising out of a contract to build a ship; action for damage to goods, carried by sea under bill of lading; action for money received by a person insured against insurance brokers; action for damages on breach of contract for purchase of large quantities of sulphuric acid; action by charterers of a ship against an insurance company on an insurance policy; action against bankers, involving the question of the effect of crossing a cheque; action for non-acceptance of shares, against jobbers on the Stock Exchange; action for non-delivery of iron under contract; action by shipowner against charterer for demurrage; action for damage to goods delivered on approval, while in the hands of the defendant. This list simply indicates the diverse cases that may come under the heading "commercial causes." In England it has been judicially stated that the Court was not instituted merely for the purpose of trying short causes—it was to try all difficult commercial causes which might take a long time to try elsewhere, and cases that require special knowledge for their proper determination: *Baerlein v. Chartered Mercantile Bank*, (1895) 2 Ch. 495.

A list of com-
mercial causes
to be kept.

List of causes to be kept by Prothonotary.

4. A list of commercial causes shall be kept by the Prothonotary. All proceedings in the causes on such list shall be in accordance with the provisions of this Act.

No cause shall be entered on such list except upon the order of a Judge as hereinafter provided.

See s. 3 and notes; s. 5 and notes.

When cause entered on list, Judge to give directions as to mode of trial, &c.

S. 5.

5. Either party to a Supreme Court common-law action may, by summons in the form prescribed, at any time after the commencement of such action, call upon the other party to show cause before a Judge in chambers why such action should not be entered in the said list.

Either party may apply to have action placed on such list.

The Judge may order the action to be so entered, and from such order there shall be no appeal. Such Judge or any other Judge shall, by such or a subsequent order, give such directions as in his opinion are expedient for the speedy determination of the questions in the action really at issue between the parties.

Form prescribed : see R. 2 and Form in Schedule to Rules, *post*.

Summons to enter in list—and for directions.—This is the most important provision of the Act and institutes an entirely new practice in our Courts. The intention of the framers of the English “notice” and of this Act seems to have been to get rid of technicalities of pleading and of proof, to get rid of issues really immaterial, to bring the parties to a speedy issue, and to fix a definite and early trial of that issue. Incidentally the practice in commercial causes in England seems to have got rid of other sources of delay in the shape of interlocutory applications such as for particulars, discovery, and interrogatories to which the system of the Judicature Acts seems particularly to lend itself.

The steps preliminary to setting down a case for trial in the N.S.W. practice are comparatively simple and give rise to very little delay. The delay arises in the present arrangement of the business of the Courts, in the system of separate periods being set apart for sittings for the trial of causes and for appeals. It is in expediting the hearing of the cause and of a possible appeal that greater improvement is mainly desirable; but whether it can be obtained while as at present the effective staff of Judges on the common law side is limited to four seems doubtful.

There is one other point in which the system instituted by this Act may be reasonably expected to bring about a reform. In the ordinary course of pleadings in a case the pleader on each side is tempted to raise issues really immaterial. Both sides may know very well the real point in dispute; but each side is naturally tempted to put the other to complete proof of the whole of his case to get any advantage of failure of proof on any issue, however little it may really be in dispute. The system under this Act by which the two sides will be brought at an early stage before a Judge to state their respective cases, will, it is to be hoped, lead to limiting the matter to be tried to the real question upon which the dispute has arisen.

In order that this may be the case, the practice as followed in England and which will doubtless be followed here, is as follows:—

At an early stage of the case, preferably before pleadings (see *infra*, At any time), the party desiring to have the cause heard as a commercial cause will take out his summons under this section to have the cause entered in the commercial list. He will usually at the same time and in the same summons apply for those further orders which the Judge has power under the next section to make. (See *such or a subsequent order, infra*). This application should be supported by a full affidavit setting out the case of the party applying. It should show what the dispute really is, putting the whole case before the Judge, so as to enable him to discover the matters really in issue and to give special directions accordingly as to pleadings, trial, &c. The other side should reply with a similar affidavit setting out their case. Out of these materials and aided by the discussion that must follow before him, the Judge should certainly be able in many cases to settle the issues of fact or law then and there, in the form of a sort of special case. In England it has been said that “as a result of this preliminary discussion before the Judge many cases have been put in train

S. 5. for settlement. When it has been found that the case must be tried a note has been made by the Judge of the questions which the parties have expressed their intention of raising, and a copy of this note has been furnished to each side, or a direction has been given that notice of grounds of claim and defence should be exchanged." "In lieu of the affidavit of documents the parties have been directed, when it appeared to the Judge to be necessary, to furnish lists of documents, and to allow inspection. The affidavit of documents provided by the (English) Rules often affords no security that a full disclosure has been made and under the substituted procedure the responsibility has been cast upon the solicitors, who as officers of the Court have been informed that the withholding of a material document will be treated as a breach of professional duty." It is to be hoped that some similar practice will arise here as no branch of the practice is in so unsatisfactory a state as that dealing with discovery and inspection of documents: see *post*, s. 6, note *discovery and inspection*. The English practice above noted it is to be observed is entirely judge-made, having the sanction neither of Rules nor of Statutes.

By summons: see Form, Schedule to Rules *post*.

At any time after the commencement of an action.—In England the application may apparently be before appearance and *ex parte*: *Barry v. Peruvian Corporation*, (1896) 1 Q.B. 209; 1 Com. Cas. 270. But here the application is by summons to show cause and would therefore not be *ex parte*. And although the section says "at any time after the commencement of an action," the application will no doubt be usually made after appearance. It will also probably be made ordinarily before pleadings as one object of the Act is to avoid pleadings; but cases can easily be conceived where the parties at any stage may desire to have the matter transferred to the commercial list; and in a proper case and by consent this should present no difficulty. But in an opposed application it may possibly be ground for objection that the pleadings have been allowed to take their ordinary course.

A Judge in Chambers.—It is understood that the Judges in their discretion as to the arrangement of their work will allot hearing of applications under this Act to Mr. Justice *Pring*.

Such or subsequent order give directions.—In ordinary cases it is contemplated, as appears by the form of summons (R.2, and Form in Schedule, *post*), that the application for directions should be made at the same time as the application to transfer to the commercial list. This should certainly be the case if the result of the Act is to be a saving of expense: as the cost of two separate interlocutory applications would almost certainly exceed the costs of the ordinary preliminary steps under the present practice. In England the practice is to include in the application to transfer an application for further directions, as, to dispense with pleadings, to order lists of documents to be exchanged (in lieu of discovery) and to fix mode and date of trial; all in the one application. Doubtless the Judge will keep some control over the number of interlocutory applications by dealing with the costs.

Costs of application.—In England costs of the application are usually costs in the cause, and will probably be so here. If unnecessary costs are incurred, as, by making two applications where one would have been sufficient, the party offending may be punished in costs even if his application is granted.

Directions.

6. To effect this purpose the Judge may inter alia do any or all of the following things—

- (a) dispense with pleadings;
- (b) dispense with the technical rules of evidence for proving any matter which is not bona fide in dispute, also with such rules as might cause expense and delay arising from commissions to take evidence and otherwise; and, without limiting the generality of this power, dispense with the proof of handwriting, documents, the identity of parties or parcels, or of authority;

- (c) require particulars of the cause of action, of the grounds of defence, or of any other circumstance connected with the cause to be served within a specified time by either party ;
- (d) order mutual discoveries and inspection ;
- (e) require either party to make admissions with respect to any question of fact involved in the cause ;
- (f) settle the issues for trial ;
- (g) order every cause to be tried without a jury, unless a jury shall be demanded by either party ;
- (h) state a case on matters of law for the Full Court.

S. 6.

(a) *Dispense with pleadings*.—There was already power given to parties by consent and order to have issues of fact tried without formal pleadings : C.L.P. Act, s. 51 (Rolin & Innes "Practice," p. 39), though such a proceeding has been very unusual. It may now, however, be anticipated that in many cases as a result of the preliminary discussion on the summons to transfer, it will be possible to state the matter for trial in the form of questions mutually agreed on the hearing of the summons. In other cases where the facts are undisputed, an admitted state of facts may be ordered to be filed : sub-a. (e), *infra*. Even where the facts are in dispute the contention of one party may be that on the facts alleged by the other he has no cause of action or defence in law. In such case the point of law may be ordered to be argued on a state of facts taken as admitted for the purpose of the argument : see R. 9, *post*.

In England the endorsement on the writ and a note taken by the Judge are sometimes treated as sufficient statement of claim and defence ; or the solicitor to the defendant is ordered to write a letter to the solicitor to the plaintiff stating what the grounds of defence are, and the letter is treated as a statement of defence. If this be done the letter is treated as no less binding than a formal defence : *Hill v. Scott*, 1 Com. Cas. 200.

See for the English practice and instances of cases tried without formal pleadings Mathew's "Practice of the Commercial Court," pp. 45-50, and the cases there cited.

Sub-section (c) (*infra*) should be read with this sub-section : if pleadings in the ordinary sense are dispensed with particulars of the cause of action and of the grounds of defence may be ordered to be given. See notes to that sub-s. (c) *require particulars (infra)*.

(b) *Dispense with technical rules*.—This sub-section invests the Judge with very wide powers. It follows to some extent clause 6 of the English "notice" dealing with commercial cases. That clause is in these words—"Application may be made to such Judge (i.e. of the Commercial Court) under the provisions of the Judicature Act, 1894, and the rules thereunder or by consent, to dispense with the technical rules of evidence for the avoidance of expense and delay which might arise from commissions to take evidence and otherwise." The direct power of the English Judges under the Judicature Acts and Rules to dispense with strict proof seem to be small and limited to evidence on interlocutory applications. But by O. 32, r. 2, a party refusing to admit documents must pay the cost of proving them ; and by r. 4 a party may be called upon to admit facts for the purpose of the particular trial, and in case of refusal must pay the costs of proof of such facts unless a Judge at the trial certifies that the refusal was reasonable, or unless the Judge otherwise directs.

The practice of the Commercial Court in regard to orders as to evidence is stated in Mathew's "Practice of the Commercial Court" as follows :—

1. *Admissions*.—Where the facts are not in dispute the parties are encouraged to make admissions formal or informal.
2. *Preliminary points of law*.—Where the facts are in dispute, but it is possible by directing the argument of a preliminary point of law to avoid the necessity for any inquiry, an order is made for the argument of the preliminary point.

S. 6.

3. *Informal proof*.—Where it is difficult to obtain strict evidence of the facts except at great expense, or after great delay, the parties are advised to treat as evidence such documents as are available.

As to the first of these heads it seems hardly to require the aid of the English rules or this sub-section. If the parties are prepared to make admissions no evidence is required. And by sub-s. (c) *infra*, the Judge may require either party to make admissions with respect to any question of fact.

As to the second head, a preliminary point of law can be decided so to speak on demurrer—on the assumption that certain facts are true, and by R. 9 (*post*) judgment can be obtained on a point of law. But doubtless the power over costs conferred by the English rules, and the absolute power conferred on a Judge by this sub-section may be very strong arguments in the hands of a Judge in “encouraging” (as Mr. Mathew says) the parties to make admissions. It is particularly under Mr. Mathew’s third head that the power conferred by the sub-section will probably be used—to avoid delay and expense, particularly where a commission would be necessary to obtain strict proof. Where a matter is not *bona fide* in dispute, or where a commission might be necessary, then if the facts really appear in correspondence, not strictly proved, as hearsay, or evidenced in some such informal way, the Judge may probably fairly say to a party hesitating to make an admission “I have power to accept this evidence as proof under the sub-section; I will either do that, or if you prefer the facts can be strictly proved, but you must pay the costs of proof.” This seems a fair position in which to put a party insisting on unnecessary proof.

Some instances are given by Mr. Mathew of the mode in which the English Courts act on informal proof. In an insurance action to recover money paid as salvage depositions made before a receiver of wreck and statements in a general average statement were received as evidence: *Ballantyne v. Mackinnon*, 1 Com. Cas. 339. In an action by indorsees against indorsers of a dishonored bill, the bill being drawn in Belgium, payable at Brussels, and indorsed in Morocco and paid by some mistake, the correspondence between the parties to the bill was admitted as evidence of the facts to avoid the expense of a commission: *Deutsche Bank v. Beriro*, 1 Com. Cas. 123, 259. In an insurance action arising out of the seizure of gold by the Government of the South African Republic, the correspondence relating to affairs in South Africa appearing in Blue Books was treated as evidence: *Driefontein Consolidated Mines v. Janson*, 5 Com. Cas. 296.

A very useful English practice appears to be to allow affidavit evidence instead of a commission. The sub-section is probably wide enough to allow the Judge to order the reception of such evidence here.

While it is certainly very desirable that there should be only one interlocutory application and that as much as possible should be done on the one summons, no doubt an application under this sub-section will necessarily often be made after the issues have been arrived at in some form or other, either on pleading or on particulars given by each side. The application should specify and the order direct the specific informal proof to be received as evidence. The formal grounds for such order would usually be those mentioned in the sub-section, that the facts are not really in dispute, and that expense and delay would be caused.

(c) *Require particulars*.—See (a) *dispense with pleadings (supra)*. This sub-section seems to follow (a) as indicating a substitute for pleadings. “Particulars” seems hardly to be used in the ordinary sense, but if pleadings are dispensed with, would probably indicate what are called in England “points” of claim and of defence under this practice. A number of precedents of such are given in Mathew, pp. 72, *et seq.*

(d) *Order mutual discoveries*.—It is unfortunate that the words discoveries and inspection were here used. The practice as to discovery and inspection under the C.L.P. Act must be admitted to be in a most unsatisfactory state, and an opportunity was offered in this Act to introduce some reform of that practice.

A very interesting practice has grown up under the English notice of ordering each party to produce all documents for the inspection of the other side. It is said (Mathew, p. 64) that in the preparation of the list of documents entire responsibility is cast upon the solicitors to the parties. As officers of the Court they are expected to act in the spirit of the order, and the concealment of a relevant document is regarded as a breach of professional duty.

As to discovery and inspection, see Rolin and Innes' Practice, pp. 65, *et seq.*

S. 6.

(e) *Require either party to make admissions.*—See sub-s. (b) *dispense with technical rules* (*supra*). The power given by sub-s. (b) to dispense with technical rules of evidence will make it easier for the Judge to “require” a party to make admissions. Doubtless such a course would only be taken in the case of matters not *bona fide* in dispute, in the words of sub-s. (b).

(f) *Settle the issues for trial.*—This will only be necessary when ordinary pleadings are dispensed with: see sub-ss. (a) and (c) (*ante*).

(g) *Order cause to be tried without a jury, &c.*—There is already power given by the Supreme Court Procedure Act, 1900, s. 3 (Rolin & Innes' Practice, p. 342), to try issues of fact without a jury by consent of both parties. This consent has rarely been given in practice.

(h) *State a case.*—There is always power for the parties to state a special case: C.L.P. Act, s. 55 (Rolin & Innes' Practice, p. 40), and also under the General Legal Procedure Act, s. 13 (Rolin & Innes' Practice, p. 232). This sub-section seems to give power to the Judge of his own motion to state a case.

7. The parties may, if they so desire, agree that the verdict of the jury or the decision of the Judge in a commercial cause shall be final. Jury's verdict or Judge's decision may be final.

See R. 10, *post*.

Supplemental.

8. The Judges or any three of them, of whom the Chief Justice, or, in his absence from the State, the senior puisne Judge, shall be one, may make rules of Court for carrying this Act into effect, and in particular for all or any of the following matters— Rules of court.

- (a) for regulating the sittings of the court to try commercial causes;
- (b) for regulating the pleading, practice, and procedure in such causes and the costs of proceedings therein.

See Rules, *post*.

9. Subject to this Act and the rules made thereunder, all enactments and rules of court in force at the time of the commencement of this Act relating to actions at law shall apply to commercial causes: Rules of court now in force.

Provided that where any provisions in respect of the practice or procedure of the Supreme Court are contained in any Act, rules of court may be made for modifying such provisions in respect to commercial causes to any extent that may be deemed necessary. Additional power as to regulation of practice and procedure by rules of court.

10. Nothing in this Act shall extend to or affect any action pending at the commencement of this Act, unless both parties to the action consent thereto. Saving.

RULES
1-8.

RULES OF COURT.

COMMERCIAL CAUSES ACT, 1903.

The fourth day of March, 1904.

IN pursuance of the powers vested in us we do order and direct as follows :—

1. These Rules shall come into force on the eighth day of March, 1904.

Summons to enter cause in list.

2. The summons to enter a cause in the list of commercial causes shall be in the form given in the Schedule to these Rules or to the like effect.

See S. 5 and Notes, *ante*.

Notice of trial date of trial fixed

3. If the date of trial be fixed by order of a Judge no notice of trial shall be required.

Date not fixed and no pleadings.

4. If the date of trial is not so fixed and an order be made dispensing with pleadings—

- (a) The plaintiff shall within such time as a Judge shall order set the cause down for trial and give notice of trial to the defendant.
- (b) If the plaintiff shall neglect to set the cause down for trial and to give notice of trial to the defendant within the time so ordered, the defendant within seven days after the expiration of such time may set the cause down for trial and give notice of trial to the plaintiff.
- (c) If neither party set the cause down within the times in this Rule provided the Prothonotary may strike the cause out of the list of commercial causes.

If pleadings are not dispensed with, notice of trial will be given under the ordinary Rules; Rolin and Innes' Practice, 393.

Judgment by default.

5. When an order is made dispensing with pleadings and ordering particulars to be given in lieu of pleadings within times fixed by the order, then if either party fail to give particulars within the times so fixed, the other party shall be at liberty to sign judgment of *non pros.* or *nil dicit* as the case may be. Such judgment may be set aside by a Judge on such terms as he may think fit.

6. If such judgment of *nil dicū* be signed by the plaintiff he may forthwith set the cause down for assessment of damages, giving notice of trial thereof to the defendant. **RULES 6-12.**

7. Sittings for the trial of commercial causes may be held at such times as may be ordered by a Judge and in default of such order such causes may be set down for hearing at the times of ordinary sittings for the trial of causes. **Assessment of damages. sittings.**

8. Cases on the list of commercial causes may be set down for trial at Circuit Courts, if a Judge so orders. **Trial on circuit.**

9. Either party may apply to a Judge at any time after the cause is entered in the list of commercial causes for his judgment on any point of law. **Judgment on points of law.**

10. If the parties agree that the verdict of the jury or the decision of a Judge in a commercial cause shall be final they shall file a written agreement to that effect signed by themselves their counsel or solicitors. **Agreement that verdict be final.**

11. In any commercial cause a Judge may order that costs be allowed and taxed on a higher scale than would ordinarily be allowed. **Costs.**

12. In commercial causes costs of advising with counsel as to the institution or defence of the suit may be allowed as costs of the action.

SCHEDULE.

FORM OF SUMMONS.

[R. 2, s. 5.]

In the Supreme Court of
New South Wales.
In Chambers.

Between A.B., Plaintiff
and
C.D., Defendant.

LET the abovenamed A.B. (or C.D.) his Attorney or Agent attend before Mr. Justice sitting in Chambers at the Supreme Court House King Street Sydney on (*Friday*) the day of at o'clock in the forenoon to show cause why this action should not be entered in the list of commercial causes and why the following further orders should not be made :—

1. That pleadings may be dispensed with.

2. That the issues for trial shall be

(a)

(b)

3. That affidavits of discovery be exchanged between the parties on or before the day of and that inspection of documents be given on or before the day of

4. That the date of trial be fixed.

5. (*Any other interlocutory order.*)

6. That the costs of this summons be costs in the cause.

On the ground that this action is a commercial cause and on the further grounds appearing in and by the affidavit of dated the day of a copy whereof is intended to be served herewith.

Dated this day of A.D. Chief Clerk.

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The Woodhill Printing Works, 127 York St., Sydney.

SUPPLEMENT
TO
ROLIN & INNES'
SUPREME COURT PRACTICE
OF NEW SOUTH WALES
AT
COMMON LAW
INCLUDING
STATUTES, RULES OF COURT AND
NOTES OF CASES
TO
December, 1912

BY
T. ROLIN, M.A., SYDNEY,
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of Lincoln's Inn, Barrister-at-Law.

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PREFACE.

It has been suggested to the Editors of the work on the Practice of the Supreme Court of New South Wales at Common Law, which was published in that year, 1903, that a second edition of, or supplement to, that work, bringing it up to date, would be a great convenience to the profession. The changes in the law on the subject do not seem great enough to warrant the expense and labour of a new edition. The Editors have therefore prepared this book as a supplement to the original work. In it will be found the Statutes touching on the subject matter passed up to the end of the year 1912. The Rules of Court promulgated to that date have been collected, and printed in the order of their date; and the Editors desire to express their particular obligation to Mr. A. G. Saddington, Deputy Prothonotary of the Supreme Court, who has supplied them with a full and complete copy of these Rules, otherwise difficult to obtain.

Notes of cases on practice on the Common Law side of the Court have been added. These notes have been arranged as annotations to the original Supreme Court Practice, following the order of the pages of that work; a system which it is believed will be found a convenient one.

The Editors desire to express their acknowledgment of the assistance rendered them in the revision of the proofs and otherwise by Mr. W. S. Hinton, Barrister-at-Law.

T. ROLIN,

GEO. M. LONG INNES.

JANUARY, 1913.

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S.C.P.=ROLIN AND INNES' SUPREME COURT PRACTICE.

CLAIMS AGAINST THE GOVERNMENT AND CROWN SUITS ACT, 1912.

COMMISSIONER'S MEMORANDUM AND CERTIFICATE.

THIS Act consolidates :—

Act No. 30 (1897).

Act No. 4 (1904).

I certify that this Act solely consolidates, and in no way alters, adds to, or amends the law as contained in the Acts thereby consolidated.

CHAS. G. HEYDON,

Commissioner for the Consolidation of the Statute Law.

TABLE

Showing how the sections of Acts consolidated have been dealt with.

Section of Repealed Acts.	Section of Consolidated Act.	Remarks.
ACT No. 30, 1897.		
1	.....	Short title.
2-4	2-4	
5-10	8-13	
ACT No. 4, 1904.		
1	.....	Short title.
2	5	
3 (1)	.....	Spent.
3 (2)	6	
4	7	

CLAIMS AGAINST THE GOVERNMENT AND CROWN SUITS ACT.

ACT No. XXVII., 1912.

An Act for consolidating enactments relating to Claims against the Government and Crown Suits.
[Assented to, 26th November, 1912.]

See generally the notes in S.C.P., pp. 197, *et seq.*

BE it enacted by the King's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and Legislative Assembly of New South Wales in Parliament assembled, and by the authority of the same, as follows :—

Short title.

1. This Act may be cited as the "Claims against the Government and Crown Suits Act, 1912."

Repeal.
Schedule.

2. (1) The Acts mentioned in the Schedule to this Act are hereby repealed.

Rules of Court
under Acts
hereby
repealed.
Act No. 30,
1897, s. 2.

(2) All rules of court made or deemed to have been made under the authority of any Act hereby repealed, and being in force at the time of the passing of this Act, shall be deemed to have been made under the authority of this Act.

Claimant may
petition
Governor.
Ibid s. 3.

3. (1) Any person having or deeming himself to have any just claim or demand whatever against the Government of New South Wales may set forth the same in a petition to the Governor praying him to appoint a nominal defendant in the matter of such petition, and the Governor may by notification in the Gazette appoint any person resident in New South Wales to be a nominal defendant accordingly.

Governor may
appoint
nominal
defendant.

(2) If within one month after presentation of such petition no such notification is made, the Colonial Treasurer shall be the nominal defendant.

Petitioner may
sue as in
ordinary cases.
Ibid s. 4.

4. The petitioner may sue such nominal defendant at law or in equity in any competent court, and every such case shall be commenced in the same way, and the proceedings and rights of parties therein shall as nearly as possible be the same, and judgment and costs shall follow or may be awarded on either side as in an ordinary case between subject and subject.

Leave to proceed under the Employers Liability Act may be given :
Sydney Harbor Trust v. Ryan, (1911) 13 C.L.R. 358.

Action not to
abate by
reason of
death of
nominal
defendant.
Act No. 4,
1904, s. 2.

5. The death of a nominal defendant appointed under this Act, or any Act hereby repealed, shall not cause the action or suit to abate, but it may be continued as hereinafter provided.

Governor to
appoint fresh
nominal
defendant.
Ibid s. 3 (2).

6. Where such death occurs the Governor shall, by notification in the Gazette, appoint any person resident in New South Wales to be a nominal defendant within fourteen days after being petitioned to do so by the claimant.

7. On an appointment being made under the last preceding section, the court before whom any such action or suit is pending, or a judge of such court, may order that the pleadings, issue, or record in the action or suit be amended by substituting for the original defendant the name of the nominal defendant so appointed; and thereupon all judgments, decrees, and orders made or given in the action or suit in respect of the original defendant shall have effect in respect of the person so appointed, and all future proceedings may be continued against the said person as if he had been the original nominal defendant.

S. 7.
Order of court for amendment of pleadings.
Act No. 4,
1904, s. 4.

8. The nominal defendant in any case under this Act shall not be individually liable in person or property by reason of his being such defendant.

Limited liability of nominal defendant.
Act No. 30,
1897, s. 5.

9. In any action or suit under this Act all necessary judgments, decrees, and orders may be given and made, including every species of relief, whether by way of—

Nature of relief.
Ibid. s. 6.

- (a) specific performance; or
- (b) restitution of rights; or
- (c) recovery of lands or chattels; or
- (d) payment of money or damages.

10. In any information, action, suit, or other proceeding by or on behalf of the Crown in respect of any property of the Crown, the proceeds, or rents, or profits whereof by any Act now in force or hereafter to be passed are to be carried to the Consolidated Revenue Fund of New South Wales, or in respect of any money due to the Crown by virtue of any Act relating to the public revenue, costs shall follow or may be awarded as in an ordinary case between subject and subject.

Costs in proceedings by Crown.
Ibid. s. 7.

11. (1) The Colonial Treasurer shall pay—

- (a) all damages and costs adjudged against such nominal defendant; or

Treasurer to pay damages, &c.
Act No. 30,
1897, s. 8.

(b) costs awarded against the Crown or Attorney-General, out of any moneys in his hands then legally applicable thereto and forming part of or belonging to the Consolidated Revenue or voted by Parliament for that purpose.

(2) In the event of such payment not being made within sixty days after demand, execution may be had for the amount, and levied upon any property vested in the Government, but not upon any property—

Execution.

- (a) vested in the Government on behalf of the Imperial Government; or
- (b) to which the Imperial Government has any claim or is in anywise entitled.

12. Costs recovered by or on behalf of the Crown shall be paid into the Treasury and become part of the Consolidated Revenue.

Payment into Treasury.
Ibid. s. 9.

13. (1) The judges of the Supreme Court, or any three of them may make general rules for carrying this Act into effect.

Rules.
Ibid. s. 10.

Claims Against the Government and Crown Suits Act.

S. 13.

(2) Such rules shall not be inconsistent with this Act and on being published in the Gazette shall have the force of law.

(3) Copies of all such rules shall be laid before both Houses of Parliament within seven days after publication thereof, or if Parliament be not sitting, then within seven days after the commencement of the next ensuing session.

(4) If either House shall at any time by resolution disapprove of such rules, the rules so disapproved of shall, on notification of such resolution to the Chief Justice, cease and determine.

SCHEDULE.

Reference to Act.	Title of Act.
Act No. 30, 1897 ..	Claims against the Government and Crown Suits Act, 1897.
Act No. 4, 1904 ..	Claims against the Government and Crown Suits (Amendment) Act, 1904.

See now the (Consolidated) Defamation Act,
1912 No. 32, ss 11, 12.

DEFAMATION (AMENDMENT) ACT, 1909.

ACT No. XXII., 1909.

An Act to amend the law of Defamation. [Assented
to, 20th December, 1909.]

BE it enacted by the King's Most Excellent Majesty, by and with
the advice and consent of the Legislative Council and Legis-
lative Assembly of New South Wales in Parliament assembled, and
by the authority of the same, as follows:—

Preliminary.

1. This Act may be cited as the "Defamation (Amendment) Short title.
Act, 1909," and shall be construed with the Defamation Act,
1901, hereinafter called the Principal Act.

Trial, costs, and execution.

10. It shall be competent for the court or a judge, upon an Consolidation
actions.
application by or on behalf of two or more defendants in actions
in respect to the same, or substantially the same libel brought by [51 & 52 Vic.,
c. 64, s. 5.]
one and the same person, to make an order for the consolidation
of such actions, so that they shall be tried together; and after such
order has been made, and before the trial of the said actions, the
defendants in any new actions instituted in respect to the same,
or substantially the same, libel may be joined in a common action
upon a joint application being made by such new defendants and
the defendants in the actions already consolidated.

In a consolidated action under this section, the jury shall
assess the whole amount of the damages (if any) in one sum, but
a separate verdict shall be taken for or against each defendant in
the same way as if the actions consolidated had been tried separately;
and if the jury find a verdict against the defendant or defendants
in more than one of the actions so consolidated, they shall proceed
to apportion the amount of damages which they have so found
between and against the said last-mentioned defendants; and the
judge at the trial, if the plaintiff is entitled to the costs of the action,
shall make such order as he may deem just for the apportionment
of such costs between and against such defendants.

S. 11.

Supplemental.

Name of
writer of
article, &c., to
be disclosed.

11. The proprietor of any newspaper may upon the written request of any person who has commenced an action in respect of any defamatory article, letter, report, or writing in any newspaper supply to such person affected thereby the name and address of the person who supplied such article, letter, report, or writing to such newspaper, and in default of compliance with such request any person affected thereby may apply to a Judge of the Supreme Court who may if he sees fit, after hearing such proprietor, direct that such name and address be so supplied.

In *Strachan v. Irmer*, (1910) 27 W.N. 45, *Sly, J.*, held that the section was intended to apply only in actions against the newspaper (proprietor, editor, or printer); that the section conferred a new right, and did not merely relate to procedure; and therefore did not apply where the publication was before the date of the Act; and gave costs in dismissing the application.

An order will not be made of course in every case; the plaintiff must show some reason for it, as that he is under some disadvantage in the conduct of the action if the name is not supplied.—*Per Ferguson, J.*: *Hollingsworth v. Hewitt*, (1911) 11 S.R. (N.S.W.) 334; 28 W.N. 53. An order may be made against the proprietor in his absence or illness, and complied with by his agent: *ibid.* No appeal lies from the Judge's exercise of his discretion: 11 S.R. (N.S.W.) 334; 28 W.N. 95. Decision of *Ferguson, J.*, affirmed by the High Court, refusing leave to appeal, 13 C.L.R. 20; but leaving open the question whether any appeal lay from the order of the Judge.

DISTRICT COURTS ACT, 1912.

ACT No. XXIII., 1912.

An Act to consolidate enactments relating to District Courts. [Assented to, 26th November, 1912.]

BE it enacted by the King's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and Legislative Assembly of New South Wales in Parliament assembled, and by the authority of the same, as follows :—

PART I.

PRELIMINARY.

1. This Act may be cited as the " District Courts Act, 1912," Short title. and is divided into Parts and Divisions as follows :—

2. (1) The several enactments mentioned in the First Schedule to this Act are to the extent therein expressed hereby Repeal. First Schedule. repealed.

The Schedule includes ss. 117, 118, 119 of the Common Law Procedure Act, 1899.

PART V.

Removal of action from Supreme Court.

139. Where, in any action brought in the Supreme Court, the claim—

- (a) does not exceed two hundred pounds ; or,
- (b) though it originally exceeded two hundred pounds, is reduced by payment, an admitted set-off, or otherwise to a sum not exceeding two hundred pounds ;

and the whole or part of the demand of the plaintiff is contested, a Judge of the Supreme Court at chambers may, on the application of either party, after joinder of issue, order such action to be tried in such District Court as he thinks fit.

This and the following sections are in lieu of ss. 117, 118, and 119 of the Common Law Procedure Act, 1899, which are repealed by this Act, s. 2 (*supra*). See the notes to those sections, S.C.P., pp. 81, *et seq.* Under the repealed sections the issues were simply sent to the District Court for trial ; but under these sections, the action is removed to the District Court, and apparently does not return to the Supreme Court.

Cohen, J., refused to make an order (under s. 117 of the C.L.P. Act) for trial in a District Court in which the defendant could not originally have

Judge of Supreme Court may order actions to be tried in a District Court. No. 22, 1905, s. 26.

- S. 139.** been sued; but, *semble*, there is power to make such an order: *Kelly v. Horrigan*, (1903) 20 W.N. 148.

Application under s. 117 of the C.L.P. Act to remit a case to the District Court refused, where the Judge of the same District Court had already tried the case, and non-suited the plaintiff on the ground that the evidence was so conflicting that he could not arrive at a decision: *Joallah Singh v. Morton*, (1905) 22 W.N. 31.

Sect. 26 of the District Courts Amendment Act, 1905, applies to actions of tort: *Schwarze v. Stockman*, (1908) 25 W.N. 109.

Actions of tort in the Supreme Court may be remitted to District Court. No. 22, 1905, s. 27.

140. Where an action of tort is brought in the Supreme Court (whatever may be the amount claimed) a Judge thereof, after joinder of issue, may, on affidavit by the defendant or his attorney that the plaintiff has no visible means of paying the costs of the defendant should a verdict be not found for the plaintiff, order—

- (a) that, unless the plaintiff, within a time to be fixed, gives security for the defendant's costs to the satisfaction of the Prothonotary, or satisfies a Judge of the Supreme Court that he has a cause of action fit to be prosecuted in the Supreme Court, all proceedings in the action shall be stayed; or
- (b) in the event of the plaintiff being unable or unwilling to give such security, or failing to satisfy a Judge as aforesaid, that the action be remitted for trial to a District Court to be named in the order.

Tort.—An action against the Railway Commissioners for personal injury to a passenger, the declaration containing counts in tort and in contract, is substantially an action for tort, and the case may be remitted under s. 27 of the District Courts Amendment Act 1905: *Maddocks v. Railway Commissioners*, (1906) 23 W.N. 43. And see *Edwards v. Mallan*, (1908) 1 K.B. 1002.

Order.—The proper order under s. 27 of the District Court Amendment Act, 1905, is that unless within a fixed time security is given, or a Judge satisfied that the action is fit to be tried in the Supreme Court, the action be remitted to the District Court: *Neilsen v. Moss*, (1906) 6 S.R. (N.S.W.) 364; 23 W.N. 134; overruling *Simounds v. Maybury*, 22 W.N. 217.

Visible means.—In an action for negligence, £75 had been paid into Court; the plaintiff had no other means; *held* that the action should be remitted to the District Court: *Todd v. Railway Commissioners*, (1906) 23 W.N. 159.

In an application to remit an action to the District Court under s. 27 of the District Court Amendment Act 1905, an affidavit of defendants' belief that plaintiff had no visible means of paying his costs is admissible: *Grattan v. Smith*, (1907) 24 W.N. 120.

Jury.—The Court, in remitting an action to the District Court, under s. 26 of the District Court Amendment Act 1905, has no power to order that the trial shall be without a jury: *Venables v. Railway Commissioners*, (1907) 24 W.N. 24.

Cause of action admitted.—Where on an application to remit an action to the District Court, the plaintiff in his affidavit admitted a cause of action on one count of the declaration, the application was refused: *Thomas v. Bassar*, (1907) 24 W.N. 61. But where money was paid into Court, see *Cox v. Chief Commissioner*, (1907) 24 W.N. 125.

Action fit to be tried in Supreme Court.—Although the plaintiff had no means, *Sly, J.*, refused to remit an action of libel to the District Court on the ground that the case was one fit to be tried in the Supreme Court: *Gray v. Morgan*, (1909) 26 W.N. 112.

141. (1) Where an action is remitted to a District Court under either of the two last preceding sections, the plaintiff shall lodge the original writ and pleadings and the order with the registrar of such Court, and the Judge of such Court shall appoint a day for the trial of the action, notice whereof shall be sent in the prescribed manner by the registrar to both parties or their attorneys. Thereafter all proceedings therein shall be taken in such Court as if the action had been originally commenced therein: Provided that on failure of the plaintiff to lodge the writ and pleadings and order as aforesaid within ten days from the taking out of the said order, then the defendant may lodge certified copies thereof.

S. 141.
When action remitted to District Court plaintiff to lodge original writ.
No. 22, 1905,
s. 28.

(2) The costs of all proceedings subsequent to the making of the said order shall be allowed according to the scale of costs in the District Courts; and the costs of the order and all proceedings previously thereto shall be allowed according to the scale of costs in the Supreme Court.

Plaintiff shall lodge.—Where the order was made on defendant's application but defendant failed for more than a year to take out the order, plaintiff was held entitled to treat the order as abandoned: *Stacey v. Donaldson*, (1908) 8 S.R. (N.S.W.) 630: 25 W.N. 18.

All proceedings, &c.—Amendment.—Under the English County Courts Act, 1888, s. 65, actions in contract may be sent to the County Court, and the action there is to be tried and proceedings taken as if the action had originally been commenced therein. A plaintiff in such a remitted action amended his particulars by adding claims in tort; *held*, that the County Court Judge had jurisdiction, if he thought fit, to entertain the action with the amended claim: *Spring v. Fernandez*, (1912) 1 K.B. 294.

EVIDENCE ACT, 1905.

(COMMONWEALTH)

ACT No. IV., 1905.

An Act relating to the law of Evidence. [Assented to,
25th August, 1905]

BE it enacted by the King's Most Excellent Majesty, the Senate, and the House of Representatives of the Commonwealth of Australia, as follows :—

Preliminary.

Short title.

1. This Act may be cited as the *Evidence Act 1905*.

Definition.

2. In this Act, unless the contrary intention appears—
“ Courts ” includes the High Court, the Commonwealth Court of Conciliation and Arbitration, all Courts exercising federal jurisdiction, the Inter-State Commission, and all Courts of the several States and parts of the Commonwealth, and all Judges and justices and all arbitrators under any law of the Commonwealth or of a State, and all persons authorized by the law of the Commonwealth or of a State or by consent of parties to hear, receive and examine evidence.

Judicial Notice.

Seal of Commonwealth to be judicially noticed.
See Qd. 62
Vict. No. 15,
s. 4.

3. All Courts shall take judicial notice of the impression of the Seal of the Commonwealth without evidence of the seal having been impressed or any other evidence relating thereto.

Certain signatures, &c., to be judicially noticed.
See Qd. 62
Vict. No. 15
s. 10.

4. All Courts shall take judicial notice of—
(a) the official signature of any person who holds or has held the office of Governor-General, Minister of State, President of the Senate, Speaker of the House of Representatives, Secretary of the Federal Executive Council, Justice of the High Court, Principal Registrar, Deputy Registrar or District Registrar of the High Court, President or Deputy President of the Commonwealth Court of Conciliation and Arbitration, Industrial Registrar or Deputy Industrial Registrar, or President or Judge or member of any Federal Court, or of the Inter-State Commission, or any office to which the Governor-General, by order published in the *Gazette*, declares this section to apply ; and

- (b) the official seal of every such person or Court ; and S. 4.
 (c) the fact that such person holds or has held such office ;
 if the signature or seal purports to be attached or appended to any
 judicial or official document.

Proof of Certain Documents.

5. Evidence of any proclamation, commission, order, or regulation issued or made by the Governor-General, or by or under the authority of a Minister, may be given in all Courts—
- (a) by the production of the *Gazette* purporting to contain it ; or Proof of proclamations commissions orders and regulations.
See N.S.W. No. 1898 s. 18.
Vict. No. 1088 s. 17.
- (b) by the production of a document purporting to be a copy thereof, and purporting to be printed by the Government Printer, or by the authority of the Government of the Commonwealth ; or Qd. 62 Vict. No. 15, s. 6.
- (c) by the production (in the case of any proclamation, commission, order, or regulation issued or made by the Governor-General) of a document purporting to be certified by the Secretary to the Federal Executive Council as a true copy thereof or extract therefrom ; or
- (d) by the production (in the case of any proclamation, commission, order, or regulation issued or made by or under the authority of a Minister) of a document purporting to be certified by a Minister as a true copy thereof or extract therefrom.

6. Whenever any book or document of the Commonwealth is of such a public nature as to be admissible in evidence on its mere production from the proper custody, any copy thereof or extract therefrom shall be admissible in evidence in all Courts if—
- (a) it is proved to be an examined copy or extract ; or Proof of public books and documents.
See 14 & 15 Vict. c. 99, s. 14.
N.S.W. 1898, No. 11 s. 16.
- (b) it purports to be signed and certified as a true copy or extract by the officer to whose custody the original is entrusted. Vict. No. 1088 s. 23.

7. All documents purporting to be copies of the Votes and Proceedings or Journals or Minutes of either House of the Parliament, or of papers presented to either House of the Parliament, if purporting to be printed by the Government Printer, shall on their mere production be admitted as evidence thereof in all Courts. Proof of Votes and Proceedings of Parliament.
See 8 & 9 Vict. c. 113 s. 3.
Vict. No. 1088 s. 26.

Proof of Certain Matters.

8. The mere production of a paper purporting to be the *Commonwealth of Australia Gazette* shall in all Courts be evidence that the paper is the *Gazette* and was published on the day on which it bears date. Proof of Commonwealth Gazette.
See Vict. No. 1088 s. 24.

9. The mere production of a paper purporting to be printed by the Government Printer or by the authority of the Government of the Commonwealth shall in all Courts be evidence that the paper was printed by the Government Printer or by such authority. Proof of printing by Government Printer.
See Qd. lb. s. 12.

S. 10.

Proof of act
done by
Governor-
General or
Minister.
See Vict. No.
1088 s. 25.

10. Where by any law at any time in force the Governor-General or a Minister is authorised or empowered to do any act, production of the *Gazette* purporting to contain a copy or notification of any such act shall in all Courts be evidence of the act having been duly done.

Proof of Judicial Proceedings.

Proof of
judicial
proceedings.
See N.S.W.
1895, No. 11
s. 20.
Vict. No. 1088
s. 16.

11. Evidence of any judicial proceeding of the High Court or of any Federal Court or of any Justice or Judge thereof, including any affidavit pleading or legal document filed or deposited in any such Court, may be given in all Courts by the production of a document purporting to be a copy thereof, and—

- (a) proved to be an examined copy thereof; or
- (b) purporting to be sealed with the seal of the Court; or
- (c) purporting to be certified as a true copy by a registrar or chief officer of the Court.

Affidavits.

Affidavit may
be sworn
before Justice
of the Peace.
Cf. Queensland
1891, No. 14,
s. 3.

12. Affidavits for use in the High Court or any Court exercising federal jurisdiction may be sworn before any Justice of the Peace without the issue of any commission for taking affidavits.

FORFEITURE AND VALIDATION OF LEASES ACT, 1905.

ACT No. VIII., 1905.

An Act to grant relief against the exercise of rights of re-entry and forfeiture under leases, and against defects invalidating certain leases; to amend the Forfeiture of Leases Act of 1901; and for other purposes. [Assented to, 21st August, 1905.]

BE it enacted by the King's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and Legislative Assembly of New South Wales in Parliament assembled, and by the authority of the same, as follows:—

PART I.

PRELIMINARY.

1. This Act may be cited as the "Forfeiture and Validation of Leases Act, 1905." Short title.

2. This Act is divided into Parts, as follows:—

Division of Act.

PART I.—PRELIMINARY—ss. 1, 2.

PART II.—FORFEITURE OF LEASES—ss. 3-5.

PART III.—INVALID LEASES UNDER POWERS—ss. 6-12.

PART II.

FORFEITURE OF LEASES.

3. This Part of this Act shall be construed with the Forfeiture of Leases Act of 1901. Incorporation of Act of 1901.

4. In this Part of this Act and in section one of the Forfeiture of Leases Act of 1901 "lease" also includes an agreement for a lease where the lessee has become entitled to have his lease granted; "under-lease" also includes an agreement for an under-lease where the under-lessee has become entitled to have his under-lease. Definitions.
55 & 56 Vic.,
c. 13, s. 5.

- S. 4. lease granted ; and in the said Part " under-lessee " includes any person deriving title under or from an under-lessee.

Power of court
to protect
under-lessees
on forfeiture of
superior leases.
55 & 56 Vic.,
c. 13, s. 4.

5. (1) Where a lessor is proceeding by suit, action, or otherwise to enforce a right of re-entry or forfeiture under any covenant, proviso, or stipulation in a lease, made either before or after the commencement of this Act, the Supreme Court in its equitable jurisdiction may, on application by any person claiming as under-lessee any estate or interest in the property comprised in the lease or any part thereof, make an order staying any such suit, action, or other proceeding on such terms as to the Court may seem just, and vesting for the whole term of the lease or any less term the property comprised in the lease or any part thereof in any person entitled as under-lessee to any estate or interest in such property upon such conditions as to execution of any deed or other document, payment of proper and reasonable rent, costs, expenses, damages, compensation, giving security or otherwise, as the court in the circumstances of each case, and having regard to the consent or otherwise of the lessor to the creation of the estate or interest claimed by the under-lessee, may think fit ; but in no case shall any such under-lessee be entitled to require a lease to be granted to him for a larger area of land or for any longer term than he had under his original under-lease.

How order
made.

(2) Any such order may be made in a suit brought for the purpose by the person claiming as under-lessee, or, where the proceeding by the lessor is in the equitable jurisdiction of the Supreme Court, may be made in such proceeding.

The Forfeiture of Leases Act 1901 is printed in the S.C.P., p. 226 ; and it has, therefore, been thought well to insert this amending section, conferring rights on under-lessees. The remainder of the Act deals with the validation of certain leases purporting to be granted under powers.

JUDGES' PENSIONS AMENDMENT ACT, 1906.

ACT No. XXVII., 1906.

An Act to amend the Supreme Court and Circuit Courts Act, 1900, and the District Courts Act, 1901, so far as they relate to the pensions of Supreme Court Judges and District Court Judges ; and for other purposes. [Assented to, 12th December, 1906.]

BE it enacted by the King's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and Legislative Assembly of New South Wales in Parliament assembled, and by the authority of the same, as follows :—

1. This Act may be cited as the "Judges' Pensions Amendment Act, 1906." Short title

2. The operation of subsection one of section twelve of the Supreme Court and Circuit Courts Acts, 1900, is restricted to a chief justice or puisne judge of the Supreme Court appointed before the commencement of this Act, and for that purpose the said subsection is amended by inserting the words "appointed before the commencement of this Act" after the words "puisne judge." Pensions of chief justice and puisne judges of Supreme Court.

The following subsections are inserted next after the said subsection :—

(2) Where a chief justice or puisne judge of the Supreme Court, appointed after the commencement of this Act, has served in such office for fifteen years, he shall on retiring be entitled to an annual pension at the rate of one-half of his salary.

(3) If such chief justice or puisne judge retires on permanent disability or infirmity, he shall if he has served in such office for five years be entitled on retiring to an annual pension at the rate of twenty one-hundredths of his salary, and at the additional rate of three one-hundredths of his salary for each complete year of his service after the expiration of the said five years to the date of his retirement, but so that the rate of his pension shall not exceed one-half of his salary.

S. 2.

*Pensions of
district court
judges.*

3. The operation of subsection one of section fourteen of the District Courts Act, 1901, is restricted to district court judges appointed before the commencement of this Act, and for that purpose the said subsection is amended by inserting the words "appointed before the commencement of this Act" after the word "judge."

The following subsections are inserted next after the said subsection :—

(2) Where a district court judge, appointed after the commencement of this Act, has served in such office for twenty years he shall on retiring be entitled to an annual pension at the rate of one-half of his salary.

(3) If such district court judge retires on permanent disability or infirmity, he shall if he has served in such office for five years be entitled to an annual pension at the rate of twenty one-hundredths of his salary, and at the additional rate of two one-hundredths of his salary for each complete year of his service after the expiration of the said five years to the date of his retirement, but so that the rate of his pension shall not exceed one-half of his salary.

For the Supreme Courts and Circuit Courts Act 1900, see S.C.P., p. 347.

JURY ACT, 1912.

TABLE.

Showing how the sections of the Repealed Acts have been dealt with.

Section of Repealed Acts.	Section of Consolidated Act.	Remarks.
ACT NO. 67, 1901.		
1	.....	Short title.
2	2	
3	3	
4	4	
5	5	
6	6	
7	7	
8	.....	Repealed.
9	.....	Repealed.
10	9	
11	10	
12	11	
13	12	Amended.
14	13	
15	14	
16	15	
17	16	
18	17	
19	18	
20	19	
21	20	
22	21	
23	22	
24	23	
25	24	
26	25	
27	26	
28	27	
29	28	
30	29	
31	30	
32	31	
33		To be dealt with under " Coroners
34	32	
35	33	
36	34	
37	35	
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Jury Act.

Section of Repealed Acts.	Section of Consolidated Act.	Remarks.
Act No. 67, 1901.—Continued.		
46	44	Repealed.
47	45	
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88	86	
Act No. 118, 1902.		
1		Short title.
2		Repealed.
3		Repealed.
4		Amended, No. 3, 1905, s. 5.
5		Operation exhausted.
Act No. 3, 1905.		
1		Short title.
2		Repealing section.
3	8	
4	46	
5	12	

JURY ACT.

ACT No. XXXI., 1912.

An Act to consolidate the statutes relating to Jurors.

[Assented to, 26th November, 1912.]

BE it enacted by the King's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and Legislative Assembly of New South Wales in Parliament assembled, and by the authority of the same, as follows :—

PART I.

Preliminary.

1. This Act may be cited as the "Jury Act, 1912," and is divided into Parts, as follows :—

PART I.—*Preliminary*—ss. 1, 2.

PART II.—*Qualifications, disqualifications, and exemptions*—ss. 3-7.

PART III.—*Jurors' districts*—s. 8.

PART IV.—*Jury lists*—ss. 9-16.

PART V.—*Jurors' books and special jurors' lists*—ss. 17-21.

PART VI.—*Lists for new Courts*—ss. 22-26.

PART VII.—*Trial by jury*—ss. 27-31.

PART VIII.—*Jury precepts and summons*—ss. 32-51.

PART IX.—*Challenge*—ss. 52-56.

PART X.—*Striking and impanelling*—ss. 57-63.

PART XI.—*Refreshment*—s. 64.

PART XII.—*Disagreement*—ss. 65, 66.

PART XIII.—*View by jurors*—ss. 67-69.

PART XIV.—*Fees*—ss. 70-77.

PART XV.—*Fines, penalties, etc.*—ss. 78-86.

2. (1) The Acts mentioned in the First Schedule to this Act are to the extent therein expressed hereby repealed.

(2) All proclamations, rules, orders, notices, summonses, precepts, lists, and jurors' books made or issued under the authority of any enactment hereby repealed, and being in force at the time of the passing of this Act, shall be deemed to have been made or issued hereunder.

PART II.

Qualifications, disqualifications, and exemptions.

3. Except as hereinafter provided, every man above the age of twenty-one years, residing in New South Wales, who has within New South Wales in his own name or in trust for him—

- (a) a clear yearly income of at least thirty pounds by the year arising out of lands, houses, or other real estate; or partly out of real and partly out of personal estate; or

S. 3.

(b) a clear real or personal estate of the value of at least three hundred pounds, shall be qualified and liable to serve on juries for the trial of all issues, civil and criminal, and for the assessment of damages in all actions at law, and to act as a juror in any district court.

4. No man—

Disqualification:
No. 67, 1901,
s. 4.

- (a) who is not a natural-born subject of the King, unless he has obtained letters of denization, or been naturalised, or has resided in New South Wales for at least seven years ; or
 - (b) who has been attainted of any treason or felony, or convicted of any crime that is infamous, unless he has obtained a pardon thereof, or is within the benefit and protection of some Act giving the force and effect of a pardon under the Great Seal for such crime ; or
 - (c) who has been twice convicted in any part of the British dominions of any treason, felony, or infamous crime,
- shall be qualified to serve on any jury under this Act.

For a very full dissertation on the history of the law of England respecting mixed juries in cases of foreigners, and for a review of the origin and progress of trial by jury in this State, see *Reg. v. Valentine* (1871) 10 S.C.R. 113, where it was held that an alien charged with a criminal offence is not entitled in this State to a jury *de medietate lingue*.

Exemptions.
Ibid., s. 5.

5. The following persons shall be absolutely freed and exempted from being returned and from serving upon any juries whatsoever, and their names shall not be inserted in the lists to be prepared by virtue of this Act, that is to say—

- (a) Judges of the Supreme Court and district courts, chairmen of courts of quarter sessions, and the ministerial officers of such courts ;
- (b) members of the Executive and Legislative Councils and of the Legislative Assembly, and the ministerial officers thereof ;
- (c) persons holding offices under the departments of the Colonial Secretary, Surveyor-General, Treasury, and Audit Office.
- (d) the mayor, town clerk, and principal surveyor of the city of Sydney ;
- (e) clergymen in holy orders, priests of the Roman Catholic faith, and other ministers of religion having established congregations ;
- (f) barristers and solicitors duly admitted to practise, and actually practising, and their clerks ;
- (g) coroners ;
- (h) stipendiary magistrates ;
- (i) gaolers, sheriff's officers, constables, and peace officers ;
- (j) physicians, surgeons, apothecaries, and druggists in actual practice ;
- (k) persons exempted by the Commonwealth Act No. 2, 1905, or any Act amending the same ;
- (l) licensed pilots and masters of vessels actually employed in trading ;

- (m) household officers and servants of the Governor ;
- (n) schoolmasters and parish clerks ;
- (o) such other persons holding office or being in the public service as the Governor exempts from service on juries either generally or for a limited period, of which exemption notice shall be given to the sheriff ;
- (p) managing directors, managers, cashiers, and tellers of banking establishments ;
- (q) persons above the age of sixty years who claim exemption at any court of petty sessions held for correcting the jury list as hereinafter provided ; and
- (r) persons incapacitated by disease or infirmity from discharging the duty of jurymen.

S. 5.

Clause 5 (1) (c). " Officers of Customs and Distilleries and of the Post Office " mentioned in the section herein consolidated have been omitted *eo nomine*, but their exemption has been provided for by including in the clause " persons exempted under the Commonwealth Act No. 2, 1905, or any Act amending the same." Military and Naval officers and Volunteers have also been omitted in terms, but are included as " persons exempted under the Commonwealth Act No. 2, 1905." The clause providing for a certificate under the hand of the officer commanding volunteer forces and consequential provisions are also omitted, as any such officers are now under the Federal Government.—(*Commissioner's note*).

Ministerial officers of both the Supreme and District Courts have been considered to be alike exempt.—(*Commissioner's Note to s. 5, Jury Act, 1901.*)

6. No person otherwise entitled to exemption from service as a juror shall be exempted unless he has claimed such exemption by notice to the sheriff thirty days at the least before he is summoned.

Exemption to be claimed.
No. 67, 1901,
s. 6.

7. (1) No person who is not duly qualified according to this Act to serve as a juror shall be liable to be summoned or impanelled to serve as a juror upon any inquest or inquiry by or before any sheriff or coroner by virtue of any writ of inquiry, or by or before any commissioner appointed under the Great Seal or the seal of the Supreme Court.

Qualification of jurors upon inquests under writs of inquiry and commissions.
Ibid., s. 7.

(2) Provided always that nothing in this section contained shall extend to any inquest before any coroner by virtue of his office.

PART III.

Jurors' districts.

8. The jurors' districts for any city, town, or place (including the city of Sydney), at which any court for the trial by jury of civil or criminal issues, or for the assessment of damages, or any court of quarter sessions or district court, is appointed to be held, shall comprise the land within such radius from the court-house of such city, town, or place as the Governor, by notification in the Gazette, may fix :

Governor may fix jurors' districts.
No. 3, 1905,
s. 3.

Provided that such radius shall not be less than ten miles ; and where there is more than one such court-house the radius shall

Jury Act.

- S. 8.** be taken from such court-house of such city, town, or place as the Governor, by such notification, may determine :

Provided also that until the jurors' district for any city, town, or place is so notified, the district as fixed by this Act shall continue to be the jurors' district for such city, town, or place.

PART IV.

Jury lists.

Notice to chief constables to make out lists.
No. 67, 1901,
s. 10.

Second
Schedule.

Third
Schedule.

Lists to be prepared by chief constables.
Ibid. s. 11.

Lists to be open for inspection.
Ibid. s. 12.

Fourth
Schedule.

Special petty sessions to be summoned.
s. 67, 1901.

9. The clerk or, if there be more than one, the senior clerk of petty sessions of the police district in which is situated any town or place where any such court is appointed to be held, shall, within the second week of October in every year, issue a notice in writing to the chief constable of the said police district in the form contained in the Second Schedule to this Act, requiring him to make out during the second, third, and fourth weeks of the month of November then next ensuing a true list of all men within the jurors' district for such town or place liable to serve on juries according to this Act ; and shall at the same time furnish him with the form of return set forth in the Third Schedule to this Act.

10. (1) The said chief constable shall forthwith after the receipt of the said notice, prepare and make out in alphabetical order a true list of every man residing within such jurors' district, qualified and liable to serve on juries as aforesaid, with the true christian and surname correctly and legibly written at full length, and with the true residence, degree, calling or business, and nature of the qualification of every such man in the proper columns of the said form of return.

(2) The chief constables of other police districts within which portions of such jurors' district may be shall assist such first-mentioned chief constable in preparing and making out such list, by communicating to him the name, residence, addition, and nature of the qualification of every man within such police districts, qualified and liable to serve on juries as aforesaid.

11. The said chief constable having made out such list shall, on the last Saturday in November, affix on the principal door of every court-house and police office in his district a notice in the form contained in the Fourth Schedule to this Act ; and shall keep the original list or a true copy thereof to be inspected by the inhabitants of the said jurors' district at any reasonable time, without fee, to the end that due notice may be given of any names improperly inserted in or omitted from the said list.

12. The said clerk of petty sessions shall, before the twentieth day of November in every year, cause all the justices resident within the jurors' district to be summoned to attend a special petty sessions, at the usual place of meeting of the petty sessions for the police district in which such town or place as aforesaid is situate, within the first fourteen days in the month of December then next,

for the purpose of correcting and allowing the jury list for such jurors' district. **S. 12.**

13. (1) The said justices shall hold a special petty sessions accordingly, and they or any two of them shall sit *de die in diem* until the said lists are corrected and allowed as hereinafter provided. Correction and allowance of lists. No. 67, 1901, s. 14.

(2) The said chief constable shall then and there produce the list of men qualified and liable to serve on juries by him prepared and made out as aforesaid.

(3) The justices attending such sessions shall thereupon examine the said list, and shall strike out therefrom the names of all persons not liable to serve or disqualified from serving upon such juries, and also the names of those who are disabled by lunacy or imbecility of mind, or by deafness, blindness, or other permanent infirmity of body, and also the names of all men of bad fame or of immoral character and repute; and shall insert in such list all names improperly omitted, and correct all errors and inaccuracies therein.

(4) If the said justices are divided in opinion upon any question as to the striking out or adding of any name, the decision thereof shall be determined by ballot.

(5) When such list is duly corrected it shall be allowed by the justices present, or two of them, who shall sign the original list and three fair copies thereof with their allowance thereof:

Provided that where no circuit court or court of quarter sessions is appointed to be held at such town or place, one fair copy only shall be necessary.

In *Richelson v. Barbour*, (1878) 1 S.C.R.N.S. 193, where a jury list had been improperly revised by a bench of magistrates, of which the plaintiff was one, a new trial was ordered.

14. The sheriff's officers acting in such jurors' district shall attend the petty sessions on notice in that behalf from the clerk of petty sessions, and there afford to the justices all such information touching the names, residences, and business of the persons mentioned in the lists as it is in the power of such officers to afford. Sheriff's officers to attend court. Ibid., s. 15.

Clause 14. At the suggestion of the Sheriff the description "Sheriff's officers" has been inserted in lieu of the term "bailiffs of the Sheriff." These officials are always appointed and described as "Sheriff's officers," and under this clause, and indeed under this Act, have no bailiff's duties to perform.—(Commissioner's note).

15. (1) If the Supreme Court or a circuit court or court of quarter sessions is appointed to be held at such town or place, the clerk of petty sessions shall, on or before the last day of December, transmit one of such fair copies to the sheriff, and if a district court is appointed to be held at such town or place, he shall, on or before such date, transmit one of such fair copies to the judge thereof. Lists to be transmitted to sheriff and district court judges. Ibid., s. 16

(2) The said clerk shall keep the said original corrected list among the records of his office; and shall have one of such fair copies ready to be produced in the Supreme Court or circuit court, or in any court of quarter sessions when the same is required therein.

"Circuit Courts" are continually referred to in this Act; but Circuit Courts have been abolished; references to Circuit Court are to be deemed to

- S. 15. refer to the Supreme Court holden at a circuit town : see Supreme Court and Circuit Courts Amendment Act, 1912, s. 25, *post*.

Sheriff to
record lists.
No. 67, 1901,
s. 17.

16. The sheriff shall keep the lists so transmitted to him among the records of his office.

PART V.

Jurors' books and special jurors' lists.

Jurors' books
to be made out
from list.
Ibid., s. 18.

17. Within ten days from the receipt of such list for any jurors' district, the sheriff shall make out therefrom a book to be called the "jurors' book" for such district, and shall in the said book transcribe in alphabetical order the names of all persons contained in the said list, beginning under each letter of the alphabet with the surname of each person, together with the addition of the residence, degree, calling or business, and qualifications of each person.

Jurors' books
to be in use for
one year or
until new lists
allowed.
Ibid., s. 19.

18. The said jurors' books shall be kept by the sheriff among the records of his office, and shall be ready to be produced in court upon the trial of every issue, and shall be brought into use on and from the first day of January after the allowance of the said list, and shall be used for one year then next following or until a new list has been duly prepared, corrected, and allowed for another year.

District Court
jurors' book.
Ibid., s. 20.

19. The judge of the district court to whom any such list is transmitted shall in like manner prepare a jurors' book for such court.

Special jurors'
list.
Ibid., s. 21.

20. (1) Immediately after making out the jurors' book for any district the sheriff shall make out therefrom a list to be called the "special jurors' list" for such district, and shall in the said list insert in alphabetical order the name of every person described in the said book as a justice of the peace, lessee of the Crown, banker, bank director, merchant, accountant, engineer, manager of a station, broker, chemist, druggist, warehouseman, commission agent, architect, or as the owner or tenant of any lands or tenements of the yearly value of one hundred pounds and upwards, together with the residence and addition of such person, and shall prefix to every name in such list its proper number from the first name down to the last in a regular arithmetical series.

- (2) The sheriff shall annex such list to the jurors' book from which it has been made out, to be kept and produced therewith.

Copies to be
sent to clerks
of petty
sessions.
Ibid., s. 22.

21. The sheriff shall forthwith transmit a copy of such list to the clerk of the petty sessions from which he has received the general list from which the same has been extracted, and such special jury list shall be kept by the said clerk of petty sessions ready to be produced in any such court as aforesaid when required therein.

PART VI.

S. 22.

Lists for new courts.

22. If the Governor by proclamation directs a circuit court, or district court, or court of quarter sessions to be held at any town or place where provision has not theretofore been made for the preparing and settling of the jury lists for such town or place, the Governor may direct the bench of magistrates of the district wherein such town or place is situate to cause jury lists for such town or place to be prepared.

On proclamation of new court, jury lists may be directed to be prepared. No. 67, 1901, s. 23.

23. (1) The said bench of magistrates shall thereupon, within three months after the receipt of such direction, cause to be prepared lists of all jurors within the jurors' district for such town or place.

Lists to be prepared within three months. *Ibid.*, s. 24.

(2) The clerks of petty sessions, chief constables, and justices shall do and perform, within the said period of three months, all such acts, matters, and things in and towards preparing, correcting, allowing, and transmitting the jury list for such jurors' district as are required to be ordinarily done under the provisions of Part IV of this Act.

24. The sheriff shall, within the said three months, make out from any such list transmitted to him a jurors' book and special jurors' list for such district according to the provisions of Part V of this Act.

Sheriff to prepare jurors' book and special jurors' list. *Ibid.*, s. 25.

25. The judge of the district court to whom any such list is transmitted shall, within ten days from the receipt of such list, make out therefrom a jurors' book for such court according to the provisions of Part V of this Act.

District Court Judge to prepare jurors' book. *Ibid.*, s. 26.

26. (1) Every such jurors' book and special jurors' list when settled shall come into force, and the persons whose names are therein set down shall be liable to serve as jurors immediately after such book or list has been made out by the sheriff or the district court judge, as the case may be.

Jurors' books and lists to come into force immediately and to continue in force until new books and lists prepared. *Ibid.*, s. 27.

(2) Every such book or list shall continue in force until a new jurors' book or special jurors' list has been made out under the provisions of this Act.

(3) If any jurors' book for a district court prepared under the provisions of this Part of this Act shall take effect between the months of April and October in any year, no new list shall be prepared until the year then next following.

PART VII.

Trial by jury.

27. (1) All crimes and misdemeanours prosecuted in the Supreme Court, the circuit courts, or courts of quarter sessions shall be tried by a jury consisting of twelve men chosen and returned according to the provisions of this Act.

Trial by jury in criminal cases. *Ibid.*, s. 28.

S. 27.

(2) Except as by this Act is otherwise provided, such jury shall be subject, as nearly as may be, to the same rules, regulations, and manner of proceeding as were observed upon criminal trials in the Court of Queen's Bench in England before the seven-teenth day of September, one thousand eight hundred and forty-seven.

Criminal
special jury.
No. 67, 1901,
s. 29.

28. (1) Upon application made to the Supreme Court by the Attorney-General or other prosecutor, or by or on behalf of any defendant, in any criminal cause depending in the said court or in any circuit court (except in cases of treason or felony), the said court may order a special jury to be summoned for the trial of the issue in such cause.

(2) Every such special jury shall be taken from the special jurors' list for the jurors' district within which such cause is to be tried, and shall be summoned, struck, and sworn in like manner as special juries under this Act for the trial of civil issues, and shall be liable to the same fines and forfeitures, and entitled to the same exemptions as are by this Act authorised with respect to such juries.

(3) Provided that any defendant making application for a special jury shall serve upon the Attorney-General or other prosecutor a notice in writing of such application at least four clear days before the time of his making the same.

Trial and
assessment in
civil cases.
Ibid., s. 30.

29. Subject to the provisions of this Act and of any other Act in force for the time being, all actions at law and civil issues of fact in the Supreme Court shall be tried, and all damages and sums of money recoverable in any such action after judgment by default or upon demurrer (other than such damages as are usually assessed or computed by the court or some officer thereof) shall be assessed, before one or more judge or judges of the said court, whether the trial or assessment is had in the said court or in any circuit court, by a jury consisting of four persons duly qualified according to law as special jurors, and returned and chosen as hereinafter mentioned.

Juries of
twelve.
Ibid., s. 31.

30. Upon application made to the said court by either the plaintiff or the defendant in any action, at any time after issue joined, the said court may order that the trial shall be had by a jury consisting of twelve persons, who shall be returned under the provisions of this Act either from amongst the class of special jurors or of common jurors, or in cases to be tried on circuit partly from each class, as the court thinks fit to order.

At any time after issue joined.—See R. 126 and note thereto, S.C.P., p. 394.

In *Allen v. Willis*, (1895) 11 W.N. 192, an application for a common jury of twelve made on the day on which the case was coming on for trial, was refused, on the ground that it was too late, and made apparently merely for purposes of delay.

Common Jury of twelve.—According to the practice of the Court here, either party may claim to have the case tried by a common jury of twelve as a matter of right: *Ritchie v. D'Arcy*, (1900) 17 W.N. 93; and *Cowlshaw*

v. McLeod, (1898) 14 W.N. 189; if his application is made in time: *Allen v. Willis* (*supra*). S. 30.

Special Jury of twelve.—With regard to a special jury of twelve it is different. In an application of that nature it lies on the party making the application to prove that the matter to be inquired into, is one of public importance or of great difficulty; and the granting of the application is entirely in the discretion of the Court. For cases of applications of this nature, see *Tate v. Goodlet*, (1864) 3 S.C.R. 12; *Thompson v. The Commissioner of Railways*, cited in note to *Tate v. Goodlet*; *Gresham v. The Commissioner of Railways*, *ibid.*, p. 13; *Nash v. The Bank of N.S.W.*, *ibid.*; *McElhone v. Bennett*, (1885) 1 W.N. 115; *Taylor v. Young*, (1886) 2 W.N. 108; *Jeanneret v. Balmain Steam Ferry Co.*, (1886) 3 W.N. 21; *McLaughlin v. Bennett*, (1889) 6 W.N. 15. In this last-mentioned case, a common jury having failed to agree, after a trial lasting five days, and the Judge reporting that the case was one of difficulty, the Court ordered the rehearing to take place before a special jury of twelve: *ibid.*, 112.

In an action on a policy of insurance, where a large amount was claimed, and issues of fraud and suicide were raised, application for a special jury of twelve was granted: *Williams v. Mutual Life Association of Australia*, (1904) 21 W.N. 157.

In an action for libel against defendants (carrying on a "trade protection" business), application for a special jury of twelve was refused: *Mac-Intosh v. Dun*, (1905) 22 W.N. 85.

In an action by a firm of merchants against a Minister of the Crown for slander, a special jury of twelve was allowed: *McArthur Ltd. v. Lyne*, (1906) 23 W.N. 34).

31. In every such case of trial or assessment as aforesaid, and in every other case whatsoever of trial by jury under the provisions of this Act, when no other mode of proceeding is by this Act specially provided, the jurors and jury and every assessment or trial by them shall, as far as may be practicable, be subject to the same rules and manner of proceeding as would in England have been observed in an action at law in the courts of Westminster or on a trial at nisi prius, before the seventeenth day of September, one thousand eight hundred and forty-seven.

Trial by jury in unprovided cases to be governed by English rules. No. 67, 1901, s. 32.

PART VIII.

Jury precepts and summonses.

32. (1) From time to time, and as often as occasion demands, precepts according to the form contained in the Fifth Schedule to this Act, to be called "general jury precepts," shall be issued, directed to the sheriff, requiring him to summon jurors for the trial of issues and assessment of damages in the Supreme and circuit courts and the courts of quarter sessions.

General jury precepts. Ibid., s. 34. Fifth Schedule.

(2) Every such precept returnable in the Supreme Court or any circuit court shall be under the hand and seal of a judge of the Supreme Court.

(3) Every such precept returnable in a court of quarter sessions shall be under the hand and seal of a chairman of a court of quarter sessions or a justice of the peace.

33. Whenever a jury of twelve or of four special jurors is required in the Supreme Court or in any circuit court for the trial of any issues, a judge of the Supreme Court shall issue a precept

Special jury precepts. Ibid., s. 35.

S. 33.

Fifth
Schedule.

Common jury
precepts.
No. 67, 1901,
s. 36.

under his hand and seal, according to the form contained in the Fifth Schedule to this Act, to be called a "special jury precept."

34. Whenever a jury of twelve common jurors is so required a judge of the Supreme Court shall issue a precept under his hand and seal according to the said form, to be called a "common jury precept."

Ibid., s. 37.

35. Every jury precept shall specify the time when and the place where the attendance of the jurors is required, and shall be issued and delivered to the sheriff eight clear days before the time so specified, if such attendance is required in the city of Sydney, and in all other cases fourteen clear days before such time.

Number of
jurors to
be summoned.

Ibid., s. 38.

36. (1) In every such precept returnable in the Supreme Court or any circuit court, the judge issuing the same may, if he think fit, require the sheriff to summon any number of jurors, not being more than four times the number to be impanelled upon any one trial.

(2) No such precept returnable in a court of quarter sessions shall require the sheriff to summon at any one time more than forty-eight or less than thirty-six jurors.

Priority of
precepts.

Ibid., s. 39.

37. The sheriff shall give priority to every jury precept whether returnable in the Supreme Court, or a circuit court, or a court of quarter sessions, according to the time of its receipt at his office.

Enlarged or
separate jury
panel may be
ordered by the
Court.

Ibid., s. 40.

38. (1) Every court sitting for the trial of prisoners may, on motion for that purpose made on behalf of either the Crown or any prisoner, order the sheriff to summon and return to the court—

(a) an enlarged jury panel, not exceeding twenty-four jurors, in addition to those already summoned; or

(b) a separate jury panel, of not less than thirty or more than sixty jurors,

to be taken from either the general or the special jury list, as the court thinks it for the interests of justice to order.

(2) Every person liable to serve as a juror, and residing within twenty miles of the place of trial, being summoned under any such order and having no lawful excuse, shall be bound to attend, and liable to be proceeded against for non-attendance as if he had been summoned under a precept in the ordinary course.

The like order
by a judge
before trial.

Ibid., s. 41.

39. At any time before the trial of a person committed or held to bail, every judge of the Supreme Court on application to him in chambers on behalf of such person or of the Crown (of which last-mentioned application such person has had due notice) shall have the same power as in the next preceding section is mentioned in respect of the intended trial of such person, whether in such court or in a circuit court or in a court of quarter sessions.

Power reserved
to courts of
issuing precepts
and making
orders, &c., as
heretofore.

Ibid., s. 42.

40. (1) The Supreme Court and circuit courts and all courts of oyer and terminer and gaol delivery and courts of quarter sessions shall respectively have and exercise the same power and authority

as they have heretofore had or exercised in issuing any writ or precept, or in making any award or order orally or otherwise for the return of a jury for the trial of any issue before any of such courts respectively, or for the amending or enlarging any panel of jurors returned for the trial of any such issue.

S. 40.

(2) The return to every such writ, precept, award or order shall be made in the manner used and accustomed in such courts respectively in England before the seventeenth day of September, one thousand eight hundred and forty-seven, save and except that the jurors shall be qualified according to this Act.

41. The Supreme Court, or any judge thereof, may make all such rules or orders upon the sheriff or other person as may be necessary to procure the attendance of a special or common jury for the trial of any cause or matter depending in such court at such time and place and in such manner as the court or judge thinks fit.

Special rule or order for summoning jury.
No. 67, 1901, s. 43.

42. (1) In every case wherein it is made to appear to the Supreme Court or to a judge thereof that the sheriff is a party or in any manner interested, the venire or precept to be issued therein shall be directed and delivered to the coroner or such other person as the said court or judge shall in that behalf appoint.

Provision for cases where the sheriff is interested.
Ibid., s. 44.

(2) Such coroner or person shall thenceforward have and exercise for the purposes of such writ or precept all the powers and duties of the sheriff.

43. (1) When a jury precept is delivered to the sheriff, he shall choose in manner following the persons to be summoned from those whose names appear in the appropriate jurors' book or special jurors' list for the district within which the attendance of jurors is by the said precept required :—

Jurors to be chosen by lot.
Ibid., s. 45.

- (a) Cards printed or stamped only with the same numbers as are prefixed in the said book or list to the names of persons liable to be summoned shall be placed in a rotating ballot-box approved of by the Minister of Justice.
- (b) Such box first having been made to rotate for one minute at least by the sheriff or his deputy, as many cards shall be drawn forth one at a time as there are jurors required to be summoned.
- (c) Where the number on any such card indicates the name of a juror whom the sheriff or his deputy knows to be dead or to have left the district, another card shall be drawn in its place ; and a special return shall be made to the court, with the names of the jurors summoned, of the names of all jurors so omitted, with the cause thereof.
- (d) The persons whose names in the said book or list correspond with the numbers on the cards so drawn shall be the jurors to be summoned.

(2) If through any casualty there is no jurors' book for such district in existence for the current year, the sheriff shall choose the jurors as aforesaid from the jurors' book for the year preceding.

S. 44.

Summons not
jurors.

No. 67, 1901,
s. 46.

Sixth
Schedule.

Service of
summons.

Ibid., s. 47.

44. The sheriff shall forthwith issue to each such juror a summons in writing signed by himself or his deputy in the form contained in the Sixth Schedule to this Act.

45. (1) Such summons shall be—

- (a) delivered to such juror or left at his usual place of abode at least four clear days before the time specified for his attendance, if his attendance is required in Sydney, and in other cases at least eight clear days before such time ; or
- (b) sent to him by post with the sheriff's seal of office thereon, in which case two additional days shall be allowed between the day of service and the time specified for his attendance.

(2) A duplicate of every summons so sent by post shall be stamped by the postmaster, or some person duly acting for him, at the time of delivery at the office for transmission ; and such duplicate shall be evidence that the juror named was served in the ordinary course of post.

Jurors not
liable to be
summoned
until list
exhausted.

No. 3, 1905, s. 4

46. In determining the persons to be summoned for a special or common jury, those persons who, during the time that the jury book has been in use, have attended at a court in pursuance of a summons, or served on a jury, shall be excluded—

- (a) from service as common jurors until the list of names in the jury book has been exhausted ; and also
- (b) from service as special jurors until the list of names on the special jurors' list has been exhausted.

Same jurors
not to be
summoned at
the same time
to attend at
courts at
Darlinghurst
and King-
street.

No. 67, 1901,
s. 49.

47. Whenever the sheriff is required by any jury precept to summon jurors for the trial of issues in the Supreme Court or court of quarter sessions at Darlinghurst on any particular day or days, and is also required by any other jury precept to summon jurors for the trial of issues on the same day or days in the Supreme Court in King-street, he shall not summon for either court the same jurors whom he has already summoned to attend at the other court, but he shall omit from any summons for either court the names of all such jurors as he has already summoned for the other, conforming in other respects in the matter of such summons to the directions of this Act.

Jurors
incapacitated
by disease.

Ibid., s. 50.

48. The sheriff in civil cases may omit the summoning of persons whom he knows to be incapacitated by disease from attending as jurors :

Provided that he shall specially return to the court the names of all such persons, with the ground on which he has omitted to summon them.

Mistakes in
names may be
corrected.

Ibid., s. 51.

49. The sheriff on showing to the satisfaction of a judge of the Supreme Court that the name or description of any juror has been mistaken may, by the leave of such judge in writing, cause the mistake to be corrected and the party to be thereafter summoned by his right name and description :

Provided that in every such case there be no question as to the identity in fact of the juror. **S. 49.**

50. Upon the day and at the place named in any jury precept for the appearance of the jurors thereby required to be summoned, the sheriff shall by himself or his deputy return the said jury precept into the court holden at the place where such jurors are so required to attend, and shall annex to the said precept a panel containing the names in alphabetical order of the persons so summoned by him in pursuance of the said jury precept, and shall also therewith furnish to the clerk of the said court the names of the said persons, with their respective additions and places of abode written upon separate pieces of card, each piece of card being as nearly as may be of equal size.

Sheriff's return to general precept.
No. 67, 1901,
s. 52.

51. No omission or informality with respect to any lists or precepts or panels returned in pursuance of this Act shall affect or invalidate any verdict returned by a jury which is in other respects according to law.

Informalities, &c., not to invalidate verdict.
Ibid., s. 53.

PART IX.

Challenge.

52. Subject to the provisions of this Act, and of any Act for the time being in force, challenge to the array and to the polls of jurors may be made and shall be allowed in every court for such and the like cause, in such and the like form and manner, and under and subject to the like laws, rules, and regulations in every respect, as by law was or were established, used and practised in like cases in the courts at Westminster before the seventeenth day of September, one thousand eight hundred and forty-seven.

Right of challenge.
Ibid., s. 54.

53. In all inquests to be taken before any court wherein the King is a party, notwithstanding it be alleged by them that sue for the King that the jurors of those inquests or some of them be not indifferent for the King, yet such inquests shall not remain untaken for that cause, but if they that sue for the King will challenge any of those jurors they shall assign of their challenge a cause certain, and the truth of the same challenge shall be inquired of according to the custom of the court, and it shall be proceeded to the taking of the same inquisitions as it shall be found if the challenges be true or not, after the discretion of the court.

Challenge for cause.
Ibid., s. 55.

54. Nothing herein contained shall affect the power of any court to order any juror to stand by until the panel shall be gone through at the prayer of those prosecuting for the Crown as has been heretofore accustomed.

Standing jurors by.
Ibid., s. 56.

See *R. v. Jury*, (1888) 9 N.S.W.R. 486; 5 W.N. 37.

55. (1) The same right of challenge to jurors shall exist in cases of misdemeanour as in cases of felony.

Challenge in criminal cases.
Ibid., s. 57.

(2) No person shall, except for cause shown, be allowed

S. 55. in either case more than eight, or if the offence charged be capital, twenty challenges.

(3) The Crown shall in every case have the same, but no greater, right.

(4) Every peremptory challenge beyond the number so allowed shall be void, and the trial shall proceed as if no such challenge had been made.

See *R. v. Jury*, (1888) 9 N.S.W.R. 486 ; 5 W.N. 37.

Informalities
in summoning
jurors.

No. 67, 1901,
s. 58.

Objections
must be taken
by challenge.

Ibid.

56. (1) No omission, error, or irregularity by the sheriff or any of his officers in the time or mode of service of any jury summons, or in the summoning or return of any juror by a wrong name (where there is no question as to his identity), shall be cause of challenge either to the array or to such juror.

(2) No matter which might have been objected by way of challenge to the polls or to the array, as the case may be, shall invalidate or affect any verdict in any case, civil or criminal, unless the objection is taken by way of challenge.

PART X.

Striking and impanelling.

Impanelling
jury in
criminal trials.
Ibid., s. 59.

57. (1) Upon calling on for trial by a jury of twelve persons any criminal issue joined in the Supreme Court or a circuit court, or a court of quarter sessions, the clerk of the court shall, in open court, put into a box provided for that purpose the pieces of card furnished as aforesaid by the sheriff, and shall draw out therefrom the said pieces of card, one after another, until twelve men appear without just cause of challenge, which said men, being duly sworn, shall be the jury to try such issue.

Tales allowed.
Ibid.

(2) If the whole number of such pieces of card is exhausted, by challenge or otherwise, before twelve men are duly sworn, either the Crown or the prisoner may pray a tales, whereupon the court or judge or chairman, as the case may be, may command the sheriff or his deputy forthwith to appoint as many good and lawful men of the bystanders (being qualified and liable to serve as jurors for the district) as may be sufficient to make up twelve men for the trial of the said issue.

(3) The pieces of card containing the names of the jurors so drawn and sworn as aforesaid shall be kept apart by themselves until such jury have given in their verdict and the same has been recorded, or until such jury is, by consent of the parties, or by leave of the court, discharged ; and then the said pieces of card shall be returned to the box, there to be kept with the other names remaining undrawn.

Different issues
may be tried
by the same
jury.
Ibid. s. 60.

58. Where no objection is made on behalf of the King or any other party, the court may—

(a) try any such criminal issue with the jury that have previously tried or been drawn to try any other such issue,

without their names being returned to the box and re-drawn; or **S. 58.**

- (b) order the name of any man on any such jury whom both parties consent to withdraw, or who is justly challenged or excused by the court, to be set aside and another name to be drawn from the box, and try such issue with the residue of such original jury and with such man whose name is so drawn, and who appears and is approved as indifferent.

59. (1) At the opening of the court upon any sitting for the trial of any civil issue under the provisions of this Act, the clerk or other ministerial officer of the court shall put into a box provided for that purpose the pieces of card furnished as aforesaid by the sheriff. Striking jury in civil cases. No. 67, 1901, s. 61.

(2) Upon any such issue being called on to be tried, such clerk or officer shall in open court draw out the said pieces of card, one after another, until twice the number of jurors required to be impanelled appear, and after all causes of challenge allowed remain indifferent and approved of, or until the whole number of such pieces of card is exhausted.

(3) In case a sufficient number of jurors named on such pieces of card are not in attendance, the full number of jurors so directed to be drawn shall be completed by appointment of the sheriff or his deputy from amongst the bystanders, being persons returned in the sheriff's books as jurors either special or common. Tales.

60. (1) In civil issues, upon twice the number of jurors required to be impanelled being completed, a list of their names shall be delivered by the sheriff or his deputy to the plaintiff or his attorney or counsel, by whom one-fourth of the whole number of names contained in such list may be struck therefrom, and the list so reduced shall then be delivered to the defendant or his attorney or counsel, by whom an equal number of names may be also struck therefrom. Impanelling jury in civil cases. Ibid., s. 62.

(2) The jurors whose names then remain upon such list, or the first four or twelve of such jurors (as the case may require), shall be the jurors for the trial of the issue or issues in question, and shall be sworn and impanelled accordingly.

(3) After every such trial the cards so drawn as aforesaid shall be returned to the box, to be kept with the others remaining undrawn.

Interference with Jury Panel.—To tamper with the jury panel is as much an interference with justice as to tamper with the jury who actually try the case. In *Parker v. Falkiner*, (1889) 10 N.S.W.R. 7, where the defendant, knowing that a particular jurymen had been summoned to try the case, spoke to him regarding the case, a new trial was granted, and defendant ordered to pay the costs of the former trial, and of the application for the new trial.

While one jury are retired considering their verdict, another jury from the same panel may be struck without the cards containing the names of the former jury being returned to the box: *Goodchap v. Nixon*, (1863) 2 S.C.R. 182.

S. 61.

Trying
different issues
by the same
jury in civil
cases.
No. 67, 1901,
s. 68.

61. Where no objection is made on behalf of any plaintiff or defendant—

- (a) any number of different issues may be tried by the same jury that have been previously drawn for or have tried any other issue without having their names returned to the box ; or
- (b) the court or judge may order the name of any juror on such jury whom the parties consent to withdraw or who may be challenged or excused to be set aside and another juror to be drawn from the box from the names remaining undrawn, who shall be subject to the same mode of striking as the original jurors, to try the issue or issues with the residue of such original jury.

When damages
assessed only.
Ibid., s. 64.

62. The provisions contained in the three next preceding sections shall be equally in force with respect to cases of assessment of damages.

Reducing list
where one
party does not
appear.
Ibid., s. 65.

63. Where—

- (a) the defendant, in a case of assessment of damages, or
- (b) either the plaintiff or defendant, in a case where there is an issue for trial,

does not appear in person, or by counsel or attorney, the list of jurors may be reduced on his behalf by the clerk or other officer of the court.

PART XI.

Refreshment.

Judge may
order
refreshment
for jury.
Ibid., s. 66.

64. The court or judge on any trial may order to be supplied to the jury—

- (a) in a criminal case, whether of felony or misdemeanour, such reasonable refreshment as the court or judge thinks fit ;
- (b) in any other case, any refreshment not being fermented or spirituous liquor,

at any time after the jury have been impanelled and sworn, and notwithstanding that they have retired to consider of their verdict.

PART XII.

Disagreement.

On criminal
trials.
Ibid., s. 67.

65. Where the jury upon the trial of any felony or misdemeanour have retired more than twelve hours, if it be found, after examination on oath of one or more of them, that they are not likely to agree, the court or judge may discharge them.

In civil cases.
Ibid., s. 68.

66. (1) Where the jury upon any civil trial or assessment of damages under this Act have remained six hours or upwards in

deliberation, if all of them do not agree as to the verdict to be given or amount of damages to be assessed, the decision of three-fourths in number of them shall be taken and entered as the verdict or assessment of all.

S. 66.

(2) If, after having remained the whole twelve hours or upwards in deliberation, three-fourths in number of the jurors do not concur in any such verdict or assessment, then such jurors shall be discharged, and the cause may without any new process for that purpose be again set down for trial or assessment (as the case may be) either at the same or any subsequent sittings, as the court or presiding judge may order.

The plaintiff, after the failure of the jury to agree to a verdict, may set down the case again for trial; and his proper course is to set it down at the next sittings, unless the Court or the Judge otherwise order: *Cohen v. Amos*, (1885) 2 W.N. 17.

Where at a trial the jury had been by consent of both parties discharged, at the suggestion of the presiding Judge, before the twelve hours had expired, but after the expiration of almost seven hours, it being stated that no probability existed of a verdict being arrived at, held that the finally successful party was entitled to the costs of the abortive trial: *Dolby v. The Bank of N.S.W.*, (1864) 3 S.C.R. 297.

PART XIII.

View by jurors.

67. (1) Whenever it appears expedient to any judge of the Supreme Court in any cause depending in the said court that some of the jury should have a view of any place in dispute in the cause, such judge may order such view upon the payment by the party applying for the same of such sum as to the said judge seems reasonable.

Order for view.
No. 67, 1901,
s. 69.

(2) Such sum shall be paid over to such jurors as have such view and attend the trial, and shall be taxed and allowed as other costs in the cause.

But the ordinary practice now is under s. 104 of the C.L.P. Act.

68. Two or more jurors, as the judge shall direct, mutually chosen by the parties, or, in the case the parties cannot agree, nominated by the sheriff, shall be shown the place by two persons appointed by the said judge.

View by two or more.
Ibid., s. 70

69. In every such case the said viewers, if in attendance upon the court, shall be the first of the jurors named in the sheriff's list, whether they are in the panel returned for the particular day of trial or not, and shall not be struck therefrom by either party; and such viewers so in attendance, together with so many of the jurors whose names first stand on the reduced list as may be necessary to make up the full number of jurors required shall form the jury to try the cause.

Viewers to be part of panel on trial.
Ibid., s. 71.

S. 70.

PART XIV.

Fees.

Compensation
to be fixed by
Governor.
No. 67, 1901,
s. 72.

70. The Governor may fix from time to time the rates of compensation to be paid to jurors for attendance in the Supreme and circuit courts and courts of quarter sessions.

Jury to be paid
accordingly.
Ibid., s. 73.

71. (1) Every juror summoned in pursuance of any precept as aforesaid who attends any such court shall for every day during his attendance upon such court, whether he has actually served upon a jury or not, be entitled to receive compensation for such attendance at the said rates.

(2) Provided that in all cases in which there is a regular team conveyance, or the passage can be conveniently made wholly or in part by water, the allowance of such portion of the journey as has or might have been performed by water shall be limited to the actual amount of the steerage or cabin passage money payable, according to the station in life of the juror.

(3) Every talesman serving with such jurors shall be entitled to the same compensation as a juror residing within five miles of the said court.

District courts.
Ibid., s. 74.

72. Every person summoned or nominated to act as a juror in any district court shall for his attendance be entitled to the same compensation and allowance for his travelling expenses as are provided for jurors attending the Supreme Court or any circuit court under a general jury precept.

Country jurors.
Ibid., s. 75.

73. So long as any country juror, unavoidably or bona fide for the purpose only of attendance on the panel, remains in the city or town where the court holds its sittings, he shall be entitled to payment in respect of every day of such detention, whether the court actually then sits or not.

Prolonged
sittings.
Ibid., s. 76.

74. Where the jury has sat on the same trial in any civil case more than three days, the presiding judge may direct the prevailing party to pay them severally, or to the sheriff or his deputy for their use, in respect of the fourth and every subsequent day such additional sum or sums, over and above the amount to which they are entitled in accordance with the said rates, as the said judge under the circumstances thinks reasonable and proper; and such sum shall be allowed as costs in the cause.

Where the plaintiff sues *in forma pauperis*, the presiding Judge at *Nisi Prius* has no jurisdiction to allow the payment of the additional fee provided for by the section: *Cuthbert v. Hogg*, (1862) 1 S.C.R. 19.

Fee to be paid
on setting
down case for
trial.
Ibid., s. 77.

75. (1) In every action in the Supreme Court the plaintiff on entering the case for trial shall pay to the Prothonotary—

- (a) in a case of assessment of damages, the sum of one pound;
- (b) in a case of trial by a jury of four, the sum of two pounds;
- (c) in a case of trial by a common jury of twelve, the sum of three pounds;
- (d) in a case of trial by a special jury of twelve, the sum of six pounds.

(2) Such sum shall be allowed as costs in the cause. **S. 75.**

(3) Provided that when the order for such jury of twelve has been made on the application of the defendant, the said sum of three pounds or six pounds, as the case may be, shall be paid by such defendant on the making of the order to the Prothonotary, or such order shall lapse and not take effect.

76. The party applying for or electing a special jury of twelve for the trial of any civil issue shall pay all expenses occasioned by the trial of the cause by the same, and shall not have any further allowance for the same upon taxation of costs than such party would be entitled to in case the cause had been tried by a common jury or a jury of four as hereinbefore directed, unless immediately after the verdict the judge before whom the cause was tried certifies under his hand that the same was a cause proper to be tried by a jury of twelve special jurors.

Costs of special jury unless judge certify. No. 67, 1901, s. 78.

77. The judges of the Supreme Court may make general rules touching the payment of the fees payable by law for juries.

General rules as to jury fees. Ibid. s. 79.

PART XV.

Fines, penalties, etc.

78. Every clerk of petty sessions or chief constable who wilfully neglects or refuses to execute any of the duties hereinbefore prescribed and appointed to be by him executed shall for every such neglect or refusal forfeit any sum not exceeding fifty pounds, whereof one moiety shall be paid to the Colonial Treasurer for the purposes of the general revenue, and the other moiety shall, with full costs, go to any person suing for the same by action of debt in the Supreme Court or in any court of petty sessions to the extent of the jurisdiction of such court.

Liabilities of clerks and constables. Ibid. s. 80.

79. (1) Every justice of the peace summoned under this Act to attend at any special petty sessions for correcting and allowing any jury list, who fails or neglects to attend such special petty sessions without any reasonable cause for such non-attendance, shall be liable to a fine not exceeding the sum of ten pounds, which shall be summarily imposed by the Supreme Court upon the motion of the Attorney-General and upon the fact of such non-attendance being duly proved to the satisfaction of the said court.

Liability of justices. Ibid. s. 81.

(2) The clerk of the bench shall at the said special petty sessions make an entry in writing of the name of every justice of the peace residing in the jurors' district and so summoned as aforesaid, distinguishing those that attended and those that were absent at the correction and allowance of the said list as aforesaid, and shall at the final adjournment of the said special petty sessions transmit a certificate thereof to the Attorney-General, verified by declaration.

(3) Such certificate shall be prima facie proof of the non-attendance of the justices therein stated to have been absent from the said special petty sessions.

S. 80.

Liability of
sheriff.
No. 67, 1901,
s. 82.

80. If the sheriff neglects or refuses to discharge the duties hereinbefore required of him, or otherwise fails well and faithfully to do and perform any of the acts, matters, and things hereby required to be by him performed, he shall for every such breach of duty be summarily fined a sum not exceeding fifty pounds, at the discretion of the court in relation to which such duties, acts, matters, and things were required to be discharged, done, and performed.

Liability of
viewers.
Ibid. s. 83.

81. If any juror who has had a view of any place in dispute in any cause according to the provisions hereinbefore contained makes default when the cause in which he was appointed a viewer is called on for trial, the court or judge may, unless reasonable cause be shown, impose upon such viewer a fine not exceeding the amount of ten pounds over and above the fine to which he is liable under the provisions hereinafter contained for non-attendance as a juror.

Liability of
jurors making
default.
Ibid. s. 84.

82. (1) If upon calling over the names upon any jury panel returned as hereinbefore required, any person whose name appears thereon fails to attend, or after appearance wilfully withdraws himself from the presence of the court, such court may summarily impose any fine not exceeding twenty pounds upon the person so failing to attend or withdrawing himself, unless good cause for his absence be made to appear on oath to the satisfaction of the said court.

(2) Provided that any such court may at any time exempt from attendance, either during the session or for any less period, any person summoned as a juror, who shows to such court on oath sufficient grounds for such exemption.

(3) Provided also that no juror summoned for the trial of civil issues shall be compelled to attend any sittings for more than three consecutive days unless the presiding judge shall otherwise order.

Liability of
coroner's
jurors, &c.,
Ibid. s. 85.

83. (1) If any person, being duly summoned and returned to serve as a juror upon any inquest or inquiry before any sheriff or coroner, or before any of the commissioners hereinbefore mentioned, does not, after being openly called three times, appear and serve as a juror, such sheriff, or in his absence the under sheriff or such coroner or commissioner (unless some reasonable excuse is proved, on oath if required), shall impose upon the person so making default such fine not exceeding five pounds as he thinks fit.

(2) Such sheriff, under sheriff, coroner, or commissioner shall make out and sign a certificate containing the christian name and surname, the residence, and trade or calling of every person so making default, together with the amount of the fine imposed and the cause of such fine, and shall transmit such certificate to the clerk of the peace for the country or district in which such defaulter resides on or before the first day of the quarter sessions next ensuing.

(3) Such clerk of the peace shall copy the fines so certified on the roll on which all fines or forfeiture imposed at such quarter sessions are copied, and the same shall be estreated, levied, and applied in like manner, and subject to the like powers, provisions, and penalties in all respects, as if they had been part of the fines imposed at such quarter sessions.

84. Any person who corruptly influences, or attempts to influence, any juror, and every juror consenting thereto, shall be guilty of a misdemeanour. **S. 84.**

Punishment for embracery. No. 67, 1901, s. 86.

85. (1) Whenever any fine is imposed on any juror for non-attendance, at any court, a summons may forthwith, or at any time afterwards, be issued under the hand of the presiding judge, calling on the juror to show cause to such court, or to the Supreme Court, if the fine has been imposed for non-attendance at a circuit court, on some day to be named, why execution should not issue for such fine. **Recovery of fines for non-attendance. Ibid. s. 87.**

(2) The like proceedings, as far as may be, shall be taken in every such case as may be now taken after a schedule or return of fines made up and filed as at present.

(3) To every such summons a note shall be subjoined that cause may be shown by affidavit sworn before a justice of the peace or commissioner, and transmitted by post to the Prothonotary or to the judge who imposed the fine.

(4) Where such affidavit is transmitted to the judge he shall thereupon have power to remit or mitigate the fine; and in default of any order to that effect the fine shall be enforced.

86. Except as hereinbefore provided—

Recovery of other fines. Ibid. s. 88.

- (a)** all fines imposed under this Act by the Supreme Court or a circuit court or by a judge thereof shall be levied and recovered in the same manner as any other fines imposed by the Supreme Court, or in the manner appointed by law for the recovery of fines imposed by justices of the peace;
- (b)** all fines imposed under this Act by a court of quarter sessions or by a chairman thereof, shall be levied and recovered in the manner appointed by law for the recovery of fines imposed by justices of the peace.

SCHEDULES.

FIRST SCHEDULE.

Reference to Act.	Title or Short Title.	Extent of Repeal.
Act No. 67, 1901 ..	Jury Act, 1901	The whole unrepealed portion, except s. 33.
Act No. 118, 1902 ..	Jury (Amendment) Act, 1902 ..	The unrepealed portion.
Act No. 3, 1905 ..	Jury (Amendment) Act, 1905 ..	The whole.

SECOND SCHEDULE.

Sec. 9.

District of
To the Chief Constable of the district of

Take notice that you are hereby required to make out, during the second, third, and fourth weeks of November next ensuing a true list in writing in the form hereunto annexed of all men within the jurors' district for liable to serve on juries according to the Jury Act, 1911.

C.P.S.

Sch. 3.

THIRD SCHEDULE.

Sec. 9, 10.

List of all persons within the jurors' district for *liable to serve on juries.*

District (and street, if in a town).	Christian and surname (full length).	Title, quality, calling, or business.	Nature of qualification.
Parramatta .. } Macquarie-street .. }	Adams, John ..	Esquire ..	{ Freehold, £100 per annum.
Sydney .. } George-street .. }	Bowles, James	Grocer ..	{ £400 of personal estate.

Sec. 11.

FOURTH SCHEDULE.

Jury List for 19 .

Notice is hereby given that I have caused a list to be made out of persons within the jurors' district for [place] liable to serve as jurors, either special or common, during the year 19 , and that a copy of such list lies for inspection in the office of the clerk of Petty Sessions in street, in this city [or town] and that the Justices in Petty Sessions will, on Tuesday, the day of December next, at the police office, in street, proceed to examine and correct the said list, when all persons having any objection to offer thereto may attend if they shall think fit.

Saturday, November, 19 .

A.B.,
Chief Constable.

Secs. 32-34.

FIFTH SCHEDULE.

Form of precept.

(To be adopted for general, special, or common juries of twelve and juries of four.)
To the Sheriff of or his deputy, greeting,—

Pursuant to the Act in such case made and provided, you are hereby commanded that you cause to come before [here insert the style of the court] to be holden at the court-house at , on [here insert the day of the week] the day of now next [or instant] good and lawful men of the jurors' district for aforesaid, duly qualified according to law as jurors [or as "common jurors" or "special jurors" according as the precept shall be intended to be a "general jury precept," "common jury precept," or "special jury precept"] to make a jury of the country for the trial of all such issues of fact or other matters as shall be then required to be tried by a general jury of twelve men [or by a common jury or a special jury of four or of twelve men according as the precept shall be intended]. And that you have then there the names of those jurors as by the law is required of you, together with due proof of the service of a summons upon such of the said jurors as shall have been served and of the time and manner thereof and of the causes wherefore the others of such jurors have not been served with such summons and also this writ.

Given under my hand and seal at this day of
A.D. 19 .

Sec. 44.

SIXTH SCHEDULE.

Form of summons.

Mr. A.B. [naming the juror], you are hereby required to appear as a juror in the Supreme or Circuit Court or Court of Quarter Sessions [naming the court] to be holden at on [here insert the day of the week] the day of next, at ten o'clock in the forenoon; and you are there to attend from day to day until you shall be discharged by the said Court, under penalty of the fine by law imposed in this behalf.

(Signed) C.D.
Sheriff.

LEGAL PROCESS FACILITATION ACT, 1904.

ACT No. VI., 1904.

An Act to make better provision for the Issue of Legal Process ; to amend the General Legal Procedure Act, 1902 ; and for purposes incidental to or consequent on the carrying out of the above objects. [Assented to, 26th October, 1904.]

BE it enacted by the King's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and Legislative Assembly of New South Wales in Parliament assembled, and by the authority of the same, as follows :—

1. This Act may be cited as the " Legal Process Facilitation Short title. Act, 1904."

2. Section four of the General Legal Procedure Act, 1902, *Repeal.* is repealed.

3. The Judges of the Supreme Court, or any three of them, may, by rules of court, empower, under such conditions as they think fit to insert in such rules, such commissioners of the said Court for taking affidavits as they may approve—

- (a) to receive any praecipe for and to issue any writ of summons in the common law jurisdiction of the said Court ;
- (b) to receive any praecipe for and to issue any writ of subpoena to give evidence in any case, civil or criminal, at such country towns as may be approved by the said Judges.

Commissioners. for taking affidavits may be empowered to issue writs and seal or sign equitable process in country towns.

4. Every such writ of summons shall be returnable in the Supreme Court, at Sydney, and every such praecipe shall, as soon as conveniently may be after the issue of the writ to which the same relates, be transmitted by the commissioner who received the same to the Prothonotary or other proper officer of the said Court.

Return of writ, and transmission of praecipe.

For the General Legal Procedure Act, s. 4, see S.C.P., p. 230.

See Rules of the 15th December, 1904, and 6th December, 1912, *post*.

SEE PRIVY COUNCIL RULES
PAGE 125.

PRIVY COUNCIL APPEALS.

ORDER IN COUNCIL.

Gazette, 16th June, 1905. No. 309.

Department of the Attorney-General and of
Justice,

Sydney, 13th June, 1905.

HIS Excellency the Governor directs the publication, for general information, of the following Despatch, dated the 3rd April, 1905, from the Secretary of State for the Colonies.

C. G. WADE.

[Circular.]

Downing-street,
3rd April, 1905.

Sir,—

I have the honour to transmit, for the information of your Government and for publication in the Colony, a copy of an Order of the King in Council of the 20th of March, 1905, amending the practice with regard to the issue of Appearance Orders to Respondents who have not appeared to an Appeal to His Majesty in Council.

I have, &c.,

ALFRED LYTTLETON.

The Officer Administering
the Government of New South Wales.

AT THE COURT AT BUCKINGHAM PALACE.

The 20th day of March, 1905.

Present :

The King's Most Excellent Majesty.

Archbishop of Canterbury. Lord Suffield.

Lord President.

Sir William Walrond.

WHEREAS there was this day read at the Board a representation from the Judicial Committee of the Privy Council, dated the 16th day of March, 1905, and in the words following, viz. :—

“The Lords of the Judicial Committee having taken into consideration the practice under which an appeal to your Majesty in Council cannot in the absence of a special order in that behalf made by their Lordships be set down for hearing *ex parte* as against a respondent to the appeal who has failed to enter an appearance

thereto in the Registry of the Privy Council unless the appellant shall have previously obtained from their Lordships two successive orders commonly known as 'Appearance Orders' requiring the said respondent to enter an appearance to the appeal within the periods by the said orders respectively limited and shall have duly published the said orders by affixing the same on the Royal Exchange and elsewhere in the usual manner and unless the said periods so limited by the said orders as aforesaid shall have expired And being of opinion that the said practice is inconvenient and ought in certain cases and subject to certain conditions to be dispensed with Their Lordships do this day agree humbly to recommend to your Majesty to order as follows, that is to say :—

Par. 1.

“ 1. That where a respondent to an appeal to your Majesty in Council whose name has been entered on the record of the appeal by the court admitting the appeal fails to enter an appearance to the appeal in the registry of the Privy Council and it appears from the transcript record in the appeal or from a certificate of the officer of the court transmitting the said transcript record to the registrar of the Privy Council that the said respondent has received notice of the order admitting the appeal to your Majesty in Council or of the order of your Majesty in Council giving the appellant special leave to appeal to your Majesty in Council (as the case may be) and has also received notice of the despatch of the said transcript record to the registrar of the Privy Council the appellant shall not subject to any direction by their Lordships to the contrary be required to take out appearance orders calling upon the said respondent to enter an appearance in the appeal and the appeal may subject as aforesaid be set down for hearing *ex parte* as against the said respondent at any time after the expiration of three calendar months from the date of the lodging of the appellant's petition of appeal in like manner as if the said appearance orders had been taken out by the appellant and the times thereby respectively limited for the said respondent to enter an appearance had expired.

“ 2. That where a respondent to an appeal to your Majesty in Council whose name has been brought on the record of the appeal by an order of your Majesty in Council fails to enter an appearance to the appeal in the registry of the Privy Council and it appears from the transcript record or from a supplementary record in the appeal or from a certificate of the officer of the Court transmitting the said transcript record or supplementary record to the registrar of the Privy Council that the said respondent has received due notice of any intended application to your Majesty in Council to bring him on the record as a respondent to the appeal the appellant shall not subject to any direction by their Lordships to the contrary be required to take out appearance orders calling upon the said respondent to enter an appearance in the appeal, and the appeal may subject as aforesaid be set down for hearing *ex parte* as against the said respondent at any time after the expiration of three calendar months from the date on which the said respondent shall have been served with a copy of your Majesty's order in Council bringing him on the record of the appeal in like manner as if the said appearance orders had been taken out by the appellant and the times

Par. 2. thereby respectively limited for the said respondent to enter an appearance had expired.

“3. That nothing herein contained shall be deemed to affect the power of their Lordships to order the appellant in an appeal referred by your Majesty to their Lordships to take out appearance orders or to be excused from taking out appearance orders in any case in which their Lordships shall think fit so to order and generally to give such directions as to the time at which and the conditions on which an appeal so referred as aforesaid shall be set down as in the opinion of their Lordships the circumstances of the case may require.

“4. That this order shall apply to all appeals in which the petition of appeal shall be lodged after the date hereof.”

His Majesty having taken the said representation into consideration, was pleased, by and with the advice of his Privy Council, to approve thereof, and of what is therein recommended. Whereof all persons whom it may concern are to take notice, and govern themselves accordingly.

A. W. FITZROY.

PRIVY COUNCIL—APPEAL FROM HIGH COURT.

Department of the Attorney General and of
Justice,

Sydney, 18th May, 1911.

HIS Excellency the Lieutenant-Governor directs the publication, for general information, of the following Despatch, dated the 10th February, 1911, from The Right Honourable the Secretary of State for the Colonies.

W. A. HOLMAN.

(Copy.)

Downing-street,

10th February, 1911.

My Lord,

With reference to my Despatch No. 182, of the 30th of November, I have the honor to transmit to you, for the information of your Ministers, copies of an Order of His Majesty in Council, respecting Appeals to His Majesty in Council from the High Court of the Commonwealth of Australia. * * * *

I have, &c.,

L. HARCOURT.

Governor,

The Right Honourable Lord Chelmsford, K.C.M.G.,
&c., &c., &c.

(Copy.)

Par. 1.

AT THE COURT AT BUCKINGHAM PALACE,
The 28th day of November, 1910.

Present :

THE KING'S MOST EXCELLENT MAJESTY.
LORD PRESIDENT, EARL BEAUCHAMP.
LORD STEWARD, LORD KNOLLYS.

WHEREAS by the Commonwealth of Australia Constitution Act (63 and 64 Vic., cap. 12), it is, among other things, enacted that, except as therein provided, the Constitution shall not impair any right which the Queen may be pleased to exercise by virtue of Her Royal prerogative to grant special leave of appeal from the High Court of the Commonwealth to Her Majesty in Council ;

And whereas it is desirable, with a view to promoting uniformity in the practice and procedure in appeals to His Majesty in Council, that provision should be made for regulating the manner in which the proceedings in the case of appeals by such special leave shall be conducted :

It is hereby ordered by the King's Most Excellent Majesty, by and with the advice of the Privy Council, that the rules hereinafter set out shall regulate appeals by special leave from the High Court of the Commonwealth of Australia to His Majesty in Council.

1. In these Rules, unless the context otherwise requires :—

- " Appeal " means appeal to His Majesty in Council ;
 - " His Majesty " includes His Majesty's heirs and successors ;
 - " Judgment " includes decree, order, sentence, or decision ;
 - " Court " means either the Full Court or a single Justice of the High Court of Australia, according as the matter in question is one which under the rules and practice of the High Court properly appertains to the Full Court or to a single Justice ;
 - " Record " means the aggregate of papers relating to an appeal (including the pleadings, proceedings, evidence, and judgments) proper to be laid before His Majesty in Council on the hearing of the appeal ;
 - " Registrar " means the Registrar or other proper officer having the custody of the records in the Court appealed from ;
 - " Month " means calendar month ;
- Words in the singular include the plural, and words in the plural include the singular.

2. The preparation of the record shall be subject to the supervision of the Court, and the parties may submit any disputed question arising in connection therewith to the decision of the Court, and the Court shall give such directions thereon as the justice of the case may require.

3. The Registrar, as well as the parties and their legal agents, shall endeavour to exclude from the record all documents (more particularly such as are merely formal) that are not relevant to the subject-matter of the appeal, and, generally, to reduce the bulk of the record as far as practicable, taking special care to avoid the duplication of documents and the unnecessary repetition

Par. 3. of headings and other merely formal parts of documents ; but the documents omitted to be copied or printed shall be enumerated in a list to be placed after the index or at the end of the record.

4. Where in the course of the preparation of a record one party objects to the inclusion of a document on the ground that it is unnecessary or irrelevant, and the other party nevertheless insists upon its being included, the record, as finally printed (whether in Australia or in England) shall, with a view to the subsequent adjustment of the costs of and incidental to such document, indicate in the index of papers, or otherwise, the fact that, and the party by whom, the inclusion of the document was objected to.

5. The record shall be printed in accordance with the rules set forth in the schedule hereto. It may be so printed either in Australia or in England.

6. Where the record is printed in Australia the Registrar shall, at the expense of the appellant, transmit to the Registrar of the Privy Council 40 copies of such record, one of which copies he shall certify to be correct by signing his name on, or initialling, every eighth page thereof and by affixing thereto the seal of the Court.

7. Where the record is to be printed in England, the Registrar shall, at the expense of the appellant, transmit to the Registrar of the Privy Council one certified copy of such record, together with an index of all the papers and exhibits in the case. No other certified copies of the record shall be transmitted to the agents in England by or on behalf of the parties to the appeal.

8. Where part of the record is printed in Australia and part is to be printed in England, Rules 6 and 7 shall, as far as practicable, apply to such parts as are printed in Australia and such as are to be printed in England respectively.

9. The reasons given by the Judge, or any of the Judges, for or against any judgment pronounced in the course of the proceedings out of which the appeal arises shall by such Judge or Judges be communicated in writing to the Registrar, and shall by him be transmitted to the Registrar of the Privy Council at the same time when the record is transmitted.

10. Where at any time between the order granting special leave to appeal and the despatch of the record to England the record becomes defective by reason of the death, or change of status, of a party to the appeal, the Court may, notwithstanding the order granting special leave to appeal, on an application in that behalf made by any person interested, grant a certificate showing who, in the opinion of the Court, is the proper person to be substituted or entered on the record in place of, or in addition to, the party who has died, or undergone a change of status, and the name of such persons shall thereupon be deemed to be so substituted or

entered on the record as aforesaid without express order of His Majesty in Council. **Par. 10.**

11. Where the record subsequently to its despatch to England becomes defective by reason of the death, or change of status, of a party to the appeal, the Court shall, upon an application in that behalf made by any person interested, cause a certificate to be transmitted to the Registrar of the Privy Council showing who, in the opinion of the Court, is the proper person to be substituted, or entered, on the record, in place of, or in addition to, the party who has died or undergone a change of status.

12. The case of each party to the appeal may be printed either in Australia or in England and shall, in either event, be printed in accordance with the rules set forth in the Schedule hereto, every tenth line thereof being numbered in the margin, and shall be signed by at least one of the counsel who attends at the hearing of the appeal, or by the party himself if he conducts his appeal in person.

13. The case shall consist of paragraphs numbered consecutively and shall state, as concisely as possible, the circumstances out of which the appeal arises, the contentions to be urged by the party lodging the same, and the reasons of appeal. References by page and line to the relevant portions of the record as printed, shall, as far as practicable, be printed in the margin, and care shall be taken to avoid, as far as possible, the reprinting in the case of long extracts from the record. The taxing officer, in taxing the costs of the appeal, shall, either of his own motion, or at the instance of the opposite party, inquire into any unnecessary prolixity in the case, and shall disallow the costs occasioned thereby.

14. Where the Judicial Committee directs a party to bear the costs of an appeal incurred in Australia, such costs shall be taxed by the proper officer of the Court in accordance with the Rules for the time being regulating taxation in the Court.

15. The Court shall conform with, and execute, any order which His Majesty in Council may think fit to make on an appeal from a judgment of the Court in like manner as any original judgment of the Court should or might have been executed.

ALMERIC FITZROY.

SCHEDULE.

- I. Records and cases in appeals to His Majesty in Council shall be printed in the form known as Demy Quarto.
- II. The size of the paper used shall be such that the sheet when folded and trimmed, will be 11 inches in height and $8\frac{1}{2}$ inches in width.
- III. The type to be used in the text shall be Pica type, but Long Primer shall be used in printing accounts, tabular matter, and notes.
- IV. The number of lines in each page of Pica type shall be 47 or thereabouts, and every tenth line shall be numbered in the margin.

S. 1.

SERVICE AND EXECUTION OF PROCESS ACT, 1905. (COMMONWEALTH)

ACT No. V., 1905.

An Act to amend the Service and Execution of Process Act, 1901. [Assented to, 25th August, 1905.]

BE it enacted by the King's Most Excellent Majesty, the Senate, and the House of Representatives of the Commonwealth of Australia, as follows :—

Short title and
incorporation.

1. This Act may be cited as the Service and Execution of Process Act 1905, and this Act and the Service and Execution of Process Act 1901 shall be read together, and may together be cited as the Service and Execution of Process Acts 1901-1905.

Provisional
warrant.
Cf. 44-5 Vict.
c. 69, s. 16.

2. Section eighteen of the Service and Execution of Process Act 1901 is hereby amended by adding at the end thereof the following sub-section :—

“(5.) Any Justice of the Peace, having jurisdiction in the State or part in which the person against whom the warrant was issued or is supposed to be, may, before the indorsement of the warrant, issue a provisional warrant for the apprehension of that person, on such information and under such circumstances as would in his opinion justify the issue of a warrant if the offence of which that person is accused were an offence punishable by the law of that State or part, and had been committed within his jurisdiction; and the provisional warrant may be executed accordingly.

“Provided that a person arrested under a provisional warrant shall be discharged unless the original warrant is produced and indorsed within a reasonable time.”

This act is now repealed by the Act following, No. 18. of 1912.

SERVICE AND EXECUTION OF PROCESS ACT, 1912. (COMMONWEALTH.)

No. 18. of 1912.

An Act to amend the *Service and Execution of Process Act* 1901, and to repeal the *Service and Execution of Process Act* 1905.

[Assented to 6th November, 1912.]

BE it enacted by the King's Most Excellent Majesty, the Senate, and the House of Representatives of the Commonwealth of Australia, as follows :—

1. (1) This Act may be cited as the *Service and Execution of Process Act* 1912. Short title and citation.
 (2) The *Service and Execution of Process Act* 1901 is in this Act referred to as the Principal Act.
 (3) The Principal Act, as amended by this Act, may be cited as the *Service and Execution of Process Act* 1901-1912.
2. The *Service and Execution of Process Act* 1905 is repealed. Repeal of Act No. 5, of 1905.
3. Section three of the Principal Act is amended by omitting from paragraph (b) the words "other mesne". Definition of "writ of summons."
4. Section four of the Principal Act is amended by inserting after the words "issued out of" the words "or requiring the defendant to appear at". Amendment of section 4.
5. Section eight of the Principal Act is amended by omitting all words after the words "that is to say :—" and inserting in their stead the following paragraphs :— Time limited for appearance.
 " (a) If the writ is issued in the State of Western Australia (outside the cities of Perth and Fremantle) or in the Northern Territory, or is to be served in the State of Western Australia or in the Northern Territory—Forty five days ;
 (b) If the writ is issued in any of the cities of Sydney, Melbourne, Brisbane, Adelaide, Hobart, or Launceston, or

- S. 5. in the Territory of the Seat of Government, for service in any State other than the State of Western Australia, or in the Territory of the Seat of Government—Twenty days ;
- (c) In any other case—Thirty days."

6. Section fifteen of the Principal Act is amended by omitting sub-section (1) and inserting in its stead the following sub-section :—

Service of summons for offence or complaint in any part of the Commonwealth.

"(1) When a summons has been issued, on information upon oath, by any Court or Judge or Police, Stipendiary, or Special Magistrate having jurisdiction in any State or part of a State or part of the Commonwealth, commanding any person—

- (a) who is charged with any offence alleged to have been committed in that State or part, whether the offence is indictable or punishable upon summary conviction ; or
- (b) against whom complaint is made, in that State or part, of his having deserted his wife or child, or left his wife or child without means of support.

to appear and answer the charge or complaint or be dealt with according to law, the summons may be served on that person in any other State or part of the Commonwealth."

Amendment of section 16.

7. Section sixteen of the Principal Act is amended—

- (a) by inserting after the words "requiring any person to appear and give evidence" the words "or to produce books or documents," and
- (b) by inserting after the words "the testimony of such person" the words "or the production of such books or documents."

Backing of warrants for execution in another State or part.

8. (1) Section eighteen of the Principal Act is amended by omitting sub-section (1) and inserting in its stead the following sub-section :—

"(1) When a warrant has been issued by any Court or Judge or any Justice of the Peace having jurisdiction in any State or part of a State or part of the Commonwealth, for the apprehension or commitment of any person—

- (a) who is charged with any offence alleged to have been committed within that State or part, whether the offence is indictable or punishable upon summary conviction ; or
- (b) against whom an indictment for any such offence has been found or presented ; or
- (c) against whom complaint has been made, in that State or part, of his having deserted his wife or child or left his wife or child without means of support ; or
- (d) who has failed to comply with an order made against him in that State or part for the support or maintenance of his wife or child ; or
- (e) who has disobeyed or failed to comply with an order made in that State or part for the payment of money or for the doing of some act ; or
- (f) who has failed to pay a fine inflicted by a Court of that State or part,

S. 8.

any Justice of the Peace having jurisdiction in any other State or part of a State or part of the Commonwealth, in or on his way to which that person is or is supposed to be, may on being satisfied, that the warrant was issued by that Court or Judge (or in the case of a warrant issued by a Justice of the Peace, upon proof on oath of the signature of the Justice) make an indorsement on the warrant authorizing its execution within that other State or part."

(2) Section eighteen of the Principal Act is further amended—

(a) by omitting from sub-section (3.), paragraph (b), the words "and answer the charge";

(b) by inserting at the end of sub-section (3), paragraph (b), the words "and answer the charge or complaint or be dealt with according to law."

(3) Section eighteen of the Principal Act is further amended by adding at the end thereof the following sub-section :—

"(5) Any Justice of the Peace, having jurisdiction in the State or part in or on his way to which the person against whom the warrant was issued is or is supposed to be, may, before the indorsement of the warrant, issue a provisional warrant for the apprehension of that person, upon such information and under such circumstances as in his opinion justify its issue; and the provisional warrant may be executed accordingly :

Provisional warrant.

Provided that a person arrested under a provisional warrant shall be discharged unless the original warrant is produced and indorsed within a reasonable time."

9. Section twenty-one of the Principal Act is amended by repealing sub-section (2) and inserting in its stead the following sub-section :—

Registration of judgments and proceedings thereunder.

"(2) From the date of registration the certificate shall be a record of the Court in which it is registered, and shall have the same force and effect in all respects as a judgment of that Court, and the like proceedings (including proceedings in bankruptcy or insolvency) may be taken upon the certificate as if the judgment had been a judgment of that Court, and interest shall be payable thereunder at the rate and from the date set out therein."

10. After section twenty-two of the Principal Act the following section is inserted :—

"22A.—(1) The Court in which any such certificate of a judgment has been registered may, upon being satisfied that the registration of the judgment was reasonably justified under the circumstances, order that the plaintiff's costs of registration and other proceedings under this Act, to an amount to be assessed by the Court of Judge, but not exceeding the amount prescribed, be paid by the defendant to the plaintiff.

Costs of proceedings under this Act.

(2) Any such order shall be deemed to be incorporated with the certificate, and the amount payable thereunder to be payable under the certificate."

11. The Third Schedule to the Principal Act is amended by inserting in the heading of the sixth column, after the words "ordered to be paid," the words "the rate of interest (if any) payable thereon, and the date from which it is payable."

Form of certificate.

SUPREME COURT AND CIRCUIT COURTS (AMENDMENT) ACT, 1912.

ACT No. IX., 1912.

An Act to amend the Supreme Court and Circuit Courts Act, 1900 ; and for purposes consequent thereon or incidental thereto. [Assented to, 4th April, 1912.]

BE it enacted by the King's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and Legislative Assembly of New South Wales in Parliament assembled, and by the authority of the same, as follows :—

Preliminary.

Short title and commencement.

1. This Act may be cited as the "Supreme Court and Circuit Courts (Amendment) Act, 1912."

This Act shall commence and come into force on the first day of July, one thousand nine hundred and twelve.

The Judges.

Repeal of ss. 6, 7, and 8 of Act of 1900.

2. Sections six, seven, and eight of the Supreme Court and Circuit Courts Act, 1900, are hereby repealed, and the following section is substituted therefor :—

Appointment of judges.

6. Whenever the office of Chief Judge in Equity, Judge exercising the Matrimonial Causes Jurisdiction of the Court, Probate Judge, or Judge in Bankruptcy becomes vacant, the Governor may appoint one of the judges to such office.

Repeal of s. 9 (1).
Ibid.

3. (1) Subsection one of section nine of the same Act is repealed, and the following is inserted in its place :—

Puisne judges.

"(1) The Governor may from time to time, by commission under the great seal, in His Majesty's name, appoint fit and proper persons to be puisne judges of the Supreme Court" : Provided that when the number of puisne judges amounts to seven or more the Governor may exercise the power conferred by this section only on resolutions of both Houses of Parliament that the state of business requires

that one or more additional puisne judges should be appointed. S. 8.

(2) Subsection two of the same section is amended by omitting "person" and inserting the word "persons," by omitting "his" and inserting the word "their," and by omitting "a judge" and inserting the word "judges."

(3) Subsection three of the same section is amended by omitting "such" and inserting the words "any such," and by omitting all the words after the words "five years standing."

4. The following section is inserted next before section thirteen of the Supreme Court and Circuit Courts Act, 1900:— New section.
Repeal of s. 9
(1) of Act of
1900.

12A. The Governor may appoint any puisne judge to be Acting Chief Justice during such period as the Chief Justice may be absent from his duties upon leave of absence or from illness or other cause. Acting Chief
Justice.

During such period the Acting Chief Justice shall have the powers, authorities, immunities, and privileges, and shall fulfil the duties of the Chief Justice, and shall receive a salary at the rate herein provided for a Chief Justice.

5. In the same Act section fourteen is repealed and section fifteen is amended by omitting paragraphs (a), (b), and (c). Acting judges.

Circuit Towns.

6. (1) Part IV of the Supreme Court and Circuit Courts Act, 1900, is repealed; and any civil cause which, at the commencement of this Act is pending in a circuit court directed to be holden at any town or place, may be heard at a sitting of the Supreme Court holden at such town or place. Repeal of Part
IV. of Supreme
Court and
Circuit Courts
Act.

(2) All proclamations made under the repealed sections twenty-two or twenty-three of the said Act and in force at the commencement of this Act are rescinded.

(3) The Supreme Court and Circuit Courts Act, 1900, is amended by omitting the words "or of any circuit court" in section two, paragraph (a) of section thirteen, the words "at Sydney" in paragraph (b) of the same section, and the words "or in any circuit court" in section thirty-four; by inserting after the word "judges" in section thirty-nine the words "or any three of them"; by omitting the words "of Part IV" in paragraph (b), the words "and in the circuit courts" in paragraph (d), and the words "and of the circuit courts" in paragraph (e) of the same section.

7. The following sections are inserted next after section twenty-one as Part IV of the same Act:— New sections.

22. The Governor, by proclamation in the Gazette, may notify cities, towns, and places as circuit towns at which the court or a judge may sit for the hearing of civil and criminal causes and matters, and may amend or rescind any such proclamation. Proclamation
of towns and
places.

Supreme Court and Circuit Courts (Amendment) Act.

S. 7.

Sittings of court at places and times proclaimed.

Venue in civil actions.

Reference to circuit court.

23. The Governor, by proclamation in the Gazette, may direct that sittings of the court or a judge for the hearing of civil and criminal causes and matters be holden in or at such of the circuit towns, and at such times as he thinks fit to appoint, and may amend or rescind any such direction.

24. The Court may be holden and any judge may sit or exercise jurisdiction in any place in New South Wales.

25. Any reference in any Act, rules, orders, or regulations to a circuit court shall be deemed to refer to the court holden at a circuit town.

By Gazette notice dated the 23rd July, 1912, the following towns were gazetted as Circuit towns. At present it is proposed to hold sittings only in the towns names of which are here put in italics :—

<i>Albury</i>	<i>Forbes.</i>	<i>Narrabri.</i>
<i>Armidale.</i>	<i>Glen Innes.</i>	<i>Narrandera.</i>
<i>Bathurst.</i>	<i>Goulburn.</i>	<i>Newcastle.</i>
<i>Bourke.</i>	<i>Grafton.</i>	<i>Orange.</i>
<i>Broken Hill.</i>	<i>Hay.</i>	<i>Singleton.</i>
<i>Condoblin.</i>	<i>Inverell.</i>	<i>Tamworth.</i>
<i>Cooma.</i>	<i>Kempsey.</i>	<i>Tenterfield.</i>
<i>Cootamundra.</i>	<i>Lismore.</i>	<i>Wagga Wagga.</i>
<i>Cowra.</i>	<i>Maitland.</i>	<i>Wollongong.</i>
<i>Deniliquin.</i>	<i>Moree.</i>	<i>Yass.</i>
<i>Dubbo.</i>	<i>Mudgee.</i>	<i>Young.</i>

Gazette notices are published from time to time of the towns in which the Court will sit and the date of sitting.

Courts of gaol delivery.

Supreme Court, Sydney, to be court of gaol delivery.

8. The gaoler at each gaol shall, at the times prescribed by rules of court, make returns in writing to the Supreme Court, Sydney, as to all persons detained in such gaol, otherwise than in pursuance of a sentence, giving the particulars required by such rules. If he fails to make such returns, he may be ordered by the Court to pay a fine not exceeding five hundred pounds.

The court shall, after the receipt of such returns with respect to a gaol, deliver such gaol.

For the purpose aforesaid, the court may be constituted by one judge sitting in open court in the exercise of the criminal jurisdiction of the court.

Except as aforesaid, it shall not be obligatory on the court or a judge to deliver any gaol, or for a gaoler, unless so directed by the Court or a judge, to make any such returns.

Times prescribed.—See R.R. 12-14 of the Rules of the 12th August, 1912, *post*.

Chamber work.

New section to Act of 1900.

9. The following new section is inserted next after section thirty-nine of the Supreme Court and Circuit Courts Act, 1900 :—

Rules giving authority to Prothonotary to sit in chambers.

39A. The judges may make rules—

- (a) for empowering the Prothonotary or Deputy Prothonotary of the court to do such things and transact such business and to exercise any such authority and

S. 8.

jurisdiction in the same as by virtue of any statute or custom or by the rules and practice of the court, or any of them respectively, are now done, transacted, or exercised by a judge sitting at chambers and as may be specified in any such rule, except in respect of matters relating to the liberty of the subject.

- (b) for regulating the attendance of the said Prothonotary or Deputy Prothonotary at chambers, the course of practice to be there pursued, and the scale of costs to be there adopted, and for fixing the scale of fees in respect of business transacted before the said Prothonotary, or abolishing or altering any scale of fees so fixed.

See Rules of the 12th August, 1912, *post*.

RULES

Of the Supreme Court of New South Wales in its
Common Law Jurisdiction, issued between the
25th March, 1903, and the 31st December, 1912.

RULES—25th MARCH, 1903.

Wednesday, the twenty-fifth day of March, A.D. 1903.

The following General Rules are hereby promulgated—

1. The duties of the Prothonotary under the Rules of the twenty-second December, 1902, may, in his absence, or during his indisposition, or at his request, be performed by the Chief Clerk of the Supreme Court.

2. No person shall be deemed to be a Managing Clerk within the meaning of the said Rules until he has attained the age of, at least twenty-five years.

M. H. STEPHEN, A.C.J.

H. E. COHEN, J.

W. GREGORY WALKER, J.

RULES—17th JUNE, 1903.

Wednesday, the seventeenth day of June, A.D. 1903.

Any person who, but for the provisions of Rule 2 of the twenty-third March, 1903, would on or before the thirty-first December, 1903, have been entitled to present himself for examination as a Managing Clerk, may, on producing a certificate or certificates from the Solicitor or Solicitors with whom he has been a clerk, or other satisfactory evidence shewing that he has been carrying out the duties of a Managing Clerk for the preceding five years, be allowed by the Judges to present himself for examination, provided, however, that no such person shall be eligible for admission as a Solicitor until he shall have attained the age of 31 years.

M. H. STEPHEN, A.C.J.

G. B. SIMPSON, J.

ROBERT D. PRING, J.

RULES—30th JUNE, 1903.

Tuesday, the thirtieth day of June, A.D. 1903.

It is hereby ordered that every person applying for a Writ of *Habeas Corpus ad testificandum* shall, unless a Judge otherwise

orders, give two days' notice to the Crown Solicitor of his intention to apply for such writ.

M. H. STEPHEN, A.C.J.

WM. OWEN, J.

ARCHD. H. SIMPSON, C.J. in Eq.

This Rule seems to refer to an application under s. 565 of the Crimes Act, by which any Court or Judge may order a prisoner to be brought before any Court to give evidence.

RULES—3rd JUNE, 1904.

Friday, the third day of June, A.D. 1904.

In pursuance of the powers vested in us by the "Landlord and Tenant Act of 1899," and of any other power or powers, we do hereby prescribe that the forms hereunder, or such adaptation thereof as may be necessary, shall be the forms of the *Præcipe* and of the Writ of Summons in an action of replevin.

In the Supreme Court
of New South Wales.

Writ of Summons in an action of replevin for [name and residence of Plaintiff] against [name and residence, or supposed residence, of Defendant as in writ].

Appearance [number of days after service].

State here the goods and chattels sought to be recovered.

Dated this day of 190 .

Plaintiff's Attorney (or Plaintiff in person).

Address.

Edward VII, by the Grace of God, of the United Kingdom of Great Britain and Ireland, and of the British Dominions beyond the Seas, King, Defender of the Faith, Emperor of India.

To C.D., of

We command you that within days after the service of this Writ upon you, inclusive of the day of such service, you do cause an appearance to be entered for you in our Supreme Court, at Sydney, in an action at the suit of the said A.B. of replevin, for the taking and unjustly detaining of certain goods and chattels of the said A.B.; and take notice that, in default of your so doing, the said A.B. may proceed therein to judgment and execution.

Witness, &c.

N.B.—This Writ is to be served within calendar months from the date thereof, or, if renewed, from the date of such renewal, including the day of such date, and not afterwards.

Indorsement to be made on the Writ before service thereof.

This Writ was issued by E.F., of _____, Attorney for the said plaintiff; or this Writ was issued in person by A.B., who resides at [mention the city, town, or parish, and also the name of the street, and number of the house of the Plaintiff's residence, if any such].

Indorsement to be made on Writ after service thereof.

This Writ was served by X.Y. on L.M. [the Defendant, or one of the Defendants] on Monday, the _____ day of _____, 190 ____.
(Signed) X.Y.

FREDK. M. DARLEY, C.J.
WM. OWEN, J.
H. E. COHEN, J.
ARCHD. H. SIMPSON, C.J. in Eq.
W. GREGORY WALKER, J.

RULES—8th JULY, 1904.

Friday, the 8th day of July, A.D. 1904.

1. When a subpoena *duces tecum* to produce documents, plans, or papers before the Supreme Court is served upon the Permanent Head of any Government Department, such documents, plans, or papers may be forwarded to the Official Head of the Jurisdiction of the Court in which their production is required.

2. When such documents, plans, or papers are required upon the trial or hearing of any cause, suit, or matter, the Official Head, to whom the same have been forwarded as aforesaid, may hand the same to the Associate of the Justice of the Court who is to try such cause, suit, or matter.

3. The production of such documents, plans, or papers by such Official Head on the hearing of any matter before him, or by any such Associate upon the trial or hearing of any cause, suit, or matter, when the production of the said documents, plans, or papers shall be formally called for, shall be deemed to be a production by the Permanent Head of the Government Department who has been subpoenaed to produce such documents, plans, or papers.

4. The above rules shall not apply to the production of documents, plans, or papers before the Supreme Court in its Criminal Jurisdiction.

FREDK. M. DARLEY, C.J.
G. B. SIMPSON, J.
H. E. COHEN, J.

RULES—15th DECEMBER, 1904.

Thursday, the fifteenth day of December, A.D. 1904.

When any Special Case, other than one stated under the Crimes Act, 1900, is set down for argument before the Full Court, the moving party shall lodge three printed or typewritten copies of the said Special Case in addition to the copy which is filed.

FREDK. M. DARLEY, C.J.
WM. OWEN, J.
G. B. SIMPSON, J.
ROBERT D. PRING, J.

RULES—15th DECEMBER, 1904.

Thursday, the fifteenth day of December, 1904.

1. No person shall be conditionally admitted as a Solicitor of this Court, nor shall any Solicitor be allowed to carry on his practice in the State of New South Wales, unless he *bond fide* resides in the said State.

2. Any person contravening the provisions of the above rule may be struck off the Roll of Solicitors.

FREDK. M. DARLEY, C.J.
WM. OWEN, J.
G. B. SIMPSON, J.
ROBERT D. PRING, J.

But see now Rules of 20th December, 1905, and 3rd September, 1909 *post*.

RULES—15th DECEMBER, 1904.

Thursday, the fifteenth day of December, A.D. 1904.

1. Writs of Summons and Writs of Subpoena may be issued at any of the cities or towns mentioned in the Schedule hereto by any Commissioner for taking affidavits who holds the office or for the time being is discharging the duties of Chamber Magistrate or Clerk of Petty Sessions for such city or town.

2. The Commissioner issuing any Writ of Summons or Writ of Subpoena shall require a *Præcipe* therefor to be handed to him before signing any writ, and shall indorse upon such *Præcipe* the date when and the place where the Writ is issued, and shall sign such indorsement, adding to his signature his official designation.

3. Every such Writ shall be sealed with the seal of the person who issues the same, and shall be attested and indorsed as provided

by the Common Law Procedure Act, 1899, and Rules of Court except that the name of the city or town where it is issued shall be inserted in the attestation in lieu of Sydney.

4. The Commissioner who issues such writ shall (except in the Criminal Jurisdiction of the Court) charge a fee of ten shillings for every Writ of Summons and five shillings for every Writ of Subpœna.

5. Such Commissioner shall forthwith forward to the Prothonotary or other proper officer of the Court every Præcipe received by him together with the fees paid in respect thereof.

6. No Writ of Subpœna *duces tecum* shall contain more than one name, nor shall any Writ of Subpœna *ad testificandum* contain more than four names.

SCHEDULE.

Albury.	Goulburn.	Newcastle.
Armidale.	Grafton.	Tamworth.
Bathurst.	Hay.	Wagga Wagga.
Broken Hill.	Lismore.	Young.
Deniliquin.	Maitland.	
Dubbo.	Mudgee.	

FREDK. M. DARLEY, C.J.

G. B. SIMPSON, J.

W. GREGORY WALKER, J.

These Rules are made in pursuance of the Legal Process Facilitation Act 1904 (*ante*, p. 41). The towns of Cootamundra and Narrabri have been added to the above list: see Rules of 6th Dec., 1912, *post*.

RULES— 17th MAY, 1905.

Wednesday, the seventeenth day of May, A.D. 1905.

I, the Honorable Sir Frederick Darley, Knight Grand Cross of the Most Distinguished Order of Saint Michael and Saint George, Chief Justice of the Supreme Court of the State of New South Wales, in pursuance of the powers vested in me by the Acts twenty-two Victoria caput twenty, and forty-eight and forty-nine Victoria caput seventy-four, hereby order and direct as follows:—

1. Any person appointed under the abovementioned Acts to take the examination of any witness or witnesses shall be entitled to demand and receive for his own use the fees set out in the Schedule hereto.

2. Any person required to attend before any such Examiner for the purpose of being examined or of producing any document shall be entitled to the like conduct money and payment for expenses and loss of time as upon an attendance at the trial at *Nisi Prius* in the Supreme Court of New South Wales.

SCHEDULE.

	£	s.	d.
For any attendance not exceeding 1 hour ..	2	2	0
For every additional hour or part thereof ..	1	1	0
For report on the examination	1	1	0
The like if very special	2	2	0
For every oath administered	0	1	0
For every exhibit marked	0	0	6

If the examination is continued after six o'clock in the evening, at the request of the parties, for every hour occupied after that time the Examiner may charge an additional 10s. 6d.

If a shorthand writer be employed to take down the evidence the party prosecuting the examination shall pay for the services of such shorthand writer upon a basis to be approved of by the parties or their Solicitors and the Examiner before the examination commences. The party prosecuting the examination shall also pay all reasonable travelling and other expenses including charges for the room (other than the Examiner's chamber or office) where the examination is taken.

If an Examiner is required to travel more than one mile from his office or residence for the purpose of holding the examination he shall be entitled to charge travelling expenses and an additional 21s. for each day occupied upon which he can conveniently return to his office or residence. For each day he is necessarily absent from his office or home and cannot conveniently return thereto, an Examiner may, if he so elect, charge the sum of £5 5s. in addition to his travelling expenses in lieu and instead of the amount he would be entitled to receive in respect of the allowances hereinbefore mentioned.

Before the allowances mentioned in the last preceding paragraph can be claimed or allowed it must be shown that it was necessary for the Examiner to hold the examination at a place other than the office or residence of such Examiner by reason of the age, sickness, or other infirmity of the witness or witnesses to be examined or that a saving of expense has been thereby effected.

If a dispute arise as to the amount of fees or allowances payable under these rules it shall be referred to the Prothonotary for decision.

FREDK. M. DARLEY, C.J.

Imperial Statutes.—The Acts 22 Vic. c. 20 and 48 & 49 Vic. c. 74, are Evidence on Commission Acts of the Imperial Parliament. They may be conveniently found in Hume-Williams & Macklin, Evidence on Commission, where they are set out in full in the Appendix.

Power to make these Rules is conferred on the Chief Justice by s. 6 of the earlier Act, amended by s. 5 of the later Act above mentioned.

RULES—1st JUNE, 1905.

Thursday, the first day of June, A.D. 1905.

In order to avoid unnecessary book-keeping in connection with the payment of Court fees by the Government of New South Wales the following Rules are hereby promulgated:—

1. No Court fees (except fees in respect of the copying of documents) shall be charged in any case in which such fees, if charged, would have to be paid by the Government of New South Wales.

2. Notwithstanding the preceding rule the Government of New South Wales shall be entitled to charge such Court Fees and include them in any costs which it may be entitled to recover from any person.

3. These rules shall apply to any Department or Board whose expenditure is paid out of the Consolidated Revenue.

WM. OWEN, J.
H. E. COHEN, J.
W. GREGORY WALKER, J.
ROBERT D. PRING, J.

RULES—17th AUGUST, 1905.

Wednesday, the seventeenth day of August, A.D. 1905.

1. Whenever any record or document produced by an officer of any Government Department is put in as an exhibit at the trial or hearing of any cause or matter, at the conclusion of such trial or hearing the Prothonotary shall on request hand out such exhibit to an officer of the Department, by which it was produced, unless a Judge otherwise orders.

2. At the time of handing out any such exhibit the Prothonotary shall obtain an undertaking, signed by the permanent head of the Department by which such exhibit was produced, to return the exhibit to the Prothonotary whenever called upon prior to the final determination of such cause of matter.

FREDK. M. DARLEY, C.J.
H. E. COHEN, J.
ROBERT D. PRING, J.

RULES—22nd AUGUST, 1905.

Tuesday, the twenty-second day of August, A.D. 1905.

It is hereby ordered that every person applying for examination as a Certificated Conveyancer shall pay to the Master in Equity the sum of six pounds six shillings in respect of such examination.

Of the said sum five pounds five shillings shall be paid to the persons appointed to hold such examination and retained by them and the sum of one pound one shilling shall be paid to the Clerk

who makes the necessary arrangements for the holding of such examination and shall be retained by him.

FREDK. M. DARLEY, C.J.
H. E. COHEN, J.
ARCHD. H. SIMPSON, C.J. in Eq.
W. GREGORY WALKER, J.
ROBERT D. PRING, J.

As to Conveyancers, see the Legal Practitioners Act, ss. 16-20, S.C.P., p 298.

NOTICE—12th DECEMBER, 1905.

Notice is hereby given that from and after this date, the special indorsement of a Writ of Summons will not, in itself, be considered a sufficient reason for bringing an action in the Supreme Court.

Dated the 12th day of December, 1905.

By direction of their Honors the Judges,

C. R. WALSH,
Prothonotary.

In the Supreme Court
of New South Wales.

Wednesday, the twentieth day of December, 1905.

It is hereby ordered that the residence in any of the States of the Australian Commonwealth shall be equivalent to residence in New South Wales for the purposes of conditional admission as a Solicitor of this Court or of practising as such Solicitor.

FREDK. M. DARLEY, C.J.
H. E. COHEN, J.
ROBERT D. PRING, J.

Wednesday, the twentieth day of December, 1905.

From and after the date hereof, in all jurisdictions of the Court when costs are being taxed under any scale of costs, the Taxing Officer may allow such expenses as he may think have been reasonably and properly incurred and paid to witnesses for qualifying to give skilled evidence.

FREDK. M. DARLEY, C.J.
WM. OWEN, J.
H. E. COHEN, J.
W. GREGORY WALKER, J.
ROBERT D. PRING, J.

In the Supreme Court
of New South Wales.

Monday, the third day of September, A.D. 1906.

No Solicitor of any Australian State shall be required to cease practising in such State before being conditionally admitted a Solicitor of the Supreme Court of New South Wales.

FREDK. M. DARLEY, C.J.
WM. OWEN, J.
ROBERT D. PRING, J.

Wednesday, the seventh day of November, 1906.

THE DENTISTS' ACT (1900, No. 45).

PROCEEDINGS ON APPEAL.

The following rules shall be the rules regulating appeals from the Dental Board to the Supreme Court under Section 9 of the Dentists' Act, 1900, except so far as they shall hereafter be duly altered, added to, or rescinded.

These Rules have been republished annexed to amended Regulations, dated 15th March, 1911 : see *Government Gazette* of that date.

1. In these rules the following words have the several meanings hereby assigned to them, unless there is something in the subject matter or context repugnant to such construction, viz. :—

Words importing the singular number include the plural number, and words importing the plural number include the singular number.

Words importing the masculine gender include females.

The words "the Court" mean three or more Judges of the Supreme Court sitting in Banco.

The words "a Judge" mean a Judge of the Supreme Court sitting in Court or in Chambers.

The words "the Board" mean the Dental Board appointed under the provisions of the Dentists' Act.

The word "person" includes a body politic or corporate.

The word "party" includes any person served with notice of or attending any proceeding.

The word "affidavit" or "oath" includes affirmation, statutory declaration, and the declaration in lieu of oath under the Oaths Act, 1900; and the word "sworn" includes affirmed and declared.

The words "in writing" and "written" include printing, lithography, and other modes of representing words in a visible form.

The words "the complainant" mean the person who has applied to the Board to refuse to register some other person, or to remove from the register such other person.

The words "the complaint" mean the written statement lodged with the Registrar of the Board by the complainant.

The words "the person charged" mean the person against whom the complainant has lodged a complaint.

The Board.—Amended by R. of 13th December, 1910, *post*.

2. Every appeal to the Court under Section 9 of the Dentists' Act, 1900, shall be brought by notice of appeal, and no petition or other formal proceeding other than such notice shall be necessary.

3. (a) Where the person charged intends to appeal to the Court against the refusal of the Board to register him as a Dentist, or the removal of him by the Board from the register as aforesaid, he shall, within twenty-eight days next after the pronouncement of the judgment of the Board, or within such extended time as the Board may allow, file in the Prothonotary's Office in the Supreme Court a notice of appeal, setting forth therein the principal grounds and reasons of and for such appeal, which notice shall be in a form similar to the form in the Schedule to these rules.

(b) Any notice of appeal may be amended at any time as to the Court may seem fit.

4. A copy of the notice of appeal shall in every case be served upon the Board and upon the complainant. For the purposes of these rules, service upon the Registrar shall be deemed to be service upon the Board. Such service shall be effected unless a Judge otherwise orders or allows further time within fourteen days next after the filing of the said notice of appeal.

5. In every case in which a notice of appeal is filed against the removal of the appellant from the register, the filing of such notice of appeal shall stay such removal until the determination of the said appeal.

6. (a) The appellant, unless a Judge otherwise orders or allows further time, shall, within twenty-eight days after the filing of the notice of appeal, lodge in the Prothonotary's Office four printed or typewritten copies of the notice of appeal, the complaint, the evidence (other than the exhibits) and the judgment of the Board appealed from, and shall, within the like time, also serve ten such copies upon the Board, and three such copies upon the complainant.

(b) Such printed copies shall be printed upon cream wove white foolscap folio paper, in pica type, leaded, with an inner margin an inch wide, and outer margin two and a half inches wide.

(c) Such typewritten copies shall be typewritten on foolscap paper, with an inner margin of not less than two inches, and an outer margin of not less than a quarter of an inch.

7. On such copies, together with an affidavit of the service thereof, being filed in the Prothonotary's Office, the appeal shall be set down for hearing.

8. In every case in which service of any document shall be directed by these rules, such service shall, unless otherwise provided, or unless a Judge shall otherwise order, be effected by serving the same personally upon the person required to be served.

9. (a) The Court shall in all cases have full discretionary power to receive further evidence upon questions of fact, such evidence to be either by oral examination in Court by affidavit, or by deposition taken before a Commissioner.

(b) Such further evidence may be given without special leave in any case as to matters which have occurred after the date of judgment of the Board from which the appeal is brought; in all other cases such further evidence shall be admitted on special grounds only, and not without special leave.

10. On the hearing of every such appeal, each party may respectively appear either in person or by solicitor or counsel. Where the Board appears in person, such appearance shall be by the President or Chairman of the Meeting from whose judgment the appeal is brought.

11. The Court shall have power to make such order as to the whole or any part of the costs of the appeal and of the hearing by the Board as to the Court may seem just, and to assess the whole or any part of such costs either with or without the consent of any party; but no order shall be made for the payment of any costs by the Board to any other party unless the Court shall be of opinion that the Board was in the matter in question actuated by malicious or improper motives.

12. All interlocutory applications shall be made to a Judge in Chambers on summons or motion supported by affidavit, and may be made *ex parte* unless such Judge shall otherwise order. Orders made by a Judge in Chambers shall be signed by him personally. The costs of every such application shall be in the discretion of such Judge, who shall have power to make such order as to the whole or any part of such costs as to him may seem just, and to assess the whole or any part of such costs, either with or without the consent of any party. Provided that no order shall be made by such Judge for the payment by the Board to any other party of any costs of any such interlocutory proceeding unless such Judge shall be of opinion that the Board was in the matter in question actuated by malicious or improper motives.

13. In every case in which any costs are ordered to be paid by one party to another party, such costs, unless assessed as aforesaid, shall be taxed and certified by the Prothonotary; provided that the Court or a Judge shall have power to appoint such other Officer as the Court or such Judge shall think fit to tax and certify the same.

14. All summonses, notices of motion, affidavits, and other documents (other than exhibits) used or intended to be used on any application to the Court or a Judge shall be intituled in the same manner as the Notice of Appeal.

15. The decrees and orders of the Court shall be signed by the Prothonotary, and be under the appropriate office seal.

16. The Court fees to be demanded and paid in respect of procedure and matters under these rules shall be the same as those

demanded from and paid by parties in similar matters in the Supreme Court.

17. Non-compliance with any of these rules shall not render any proceeding void unless the Court or a Judge so directs, but such proceedings may be set aside, either wholly or in part, as irregular, or amended or otherwise dealt with in such manner and upon such terms (if any) as appear to be just.

SCHEDULE.—Referred to in Rule 3.

Form of Notice of Appeal.

In the Supreme Court
of New South Wales.

In the matter of the Dentists' Act 1900. And in the matter of the complaint of (naming the complainant) against (name of appellant).

Between (name of appellant) . Appellant,
And the Dental Board of New South Wales,
And (insert name of complainant),

Respondents.

Take notice that (the appellant) of (insert address and description) appeals against the Judgment of the abovenamed Dental Board of New South Wales, made on the day of whereby the said Board refused to register the said appellant as a Dentist (or ordered the removal of the appellant from the register of Dentists) for the following among other grounds and reasons, that is to say:—(If more than one ground number them consecutively 1, 2, 3, &c.).

(Signed) A.B.

(Counsel or Solicitor for the Appellant or Appellant in person)

FOURTH SCHEDULE.—Referred to in Regulation 48.

Request to Witnesses, or for the Production of Documents.

In the matter of the Dentists' Act, 1900. And in the matter of the complaint of (naming the complainant) against (name the person charged)

You are hereby requested by the Dental Board of New South Wales to attend a Special Meeting of the said Board, to be holden at on the day of 19 , at o'clock in the noon, to give evidence in the above matter, and then and there to produce (state any particular documents required).

(In case where the production of documents is alone required, the following words to be added:—Should you be unable or unwilling to personally attend the said meeting for the purpose of producing the said documents, the Board request that you cause the same to be produced at the said meeting by some person on your behalf, or forwarded prior to the said meeting to the undersigned, who will produce the same on your behalf. All such documents so produced or forwarded will be returned to you when no longer required for the purposes of the above matter.)

DATED this day of 19 .

For the Dental Board of New South Wales,

(Signed)

A. B,

Registrar.

(State Address.)

Note.—This request is made on the application of

FREDK. M. DARLEY, C.J.

WM. OWEN, J.

H. E. COHEN, J.

RULES—15th NOVEMBER, 1906.

Thursday, the fifteenth day of November, A.D. 1906.

Where any Court fees are payable in any jurisdiction in respect of any matter or thing to be done by any officer or in any office whatever of the Supreme Court, and it has not been customary or necessary to use any written or printed document or paper in reference to such matter or thing, the party or his solicitor requiring such matter or thing to be done shall, from and after the first day of January, 1907, make application for the same by filing a præcipe or lodging a request for the performance of such matter or thing.

FREDK. M. DARLEY, C.J.
G. B. SIMPSON, J.
H. E. COHEN, J.

RULES FOR THE ADMISSION OF BARRISTERS.

Friday, the sixteenth day of November, A.D. 1906.

In pursuance of all powers vested in us, or any of us, as members of the Barristers' Admission Board, or as Judges of the Supreme Court of New South Wales, we do order and direct as follows:—

See Legal Practitioners Act 1898, ss. 4 *et seq.*, S.C.P., p. 296.

Commence-
ment.

1. These Rules shall come into force on the first day of December, 1906.

Rescission of
former rules.

2. All Rules heretofore made with reference to the examination and admission of candidates for admission as barristers are hereby rescinded: Provided that this rescission shall not affect anything done under the said Rules, and that all persons nominated, appointed, or admitted under the said Rules shall be deemed to have been nominated, appointed, or admitted under these Rules.

Interpretation.

3. In these Rules, unless the context or subject-matter otherwise indicates or requires,—

“Barrister” means a barrister-at-law admitted by the Court;

“Board” means the board appointed under the Legal Practitioners’ Act, 1898, for the approval of properly qualified persons to be barristers;

“Court” means the Supreme Court;

“Solicitor” means an attorney, solicitor, and proctor of the Court;

“Graduate” means a person who has taken any degree in arts, law, or medicine, granted after examination in any university within the meaning of these Rules;

“University” means the University of Sydney or any university within the meaning of the Legal Practitioners’ Act, 1898;

“Secretary” means the Secretary to the Board;

"Student-at-law" means any person who has been admitted by the Board with a view to his qualifying for admission as a barrister, whether his studentship has expired or not.

Qualifications.

4. The following persons only shall be eligible for admission as barristers:—

Qualifications.
24 Sept., 1891,
R. 2.

(a) Barristers-at-law, or advocates admitted in Great Britain or Ireland.

(b) Barristers duly admitted to practise in the Supreme Courts of Victoria or of Queensland.

15 Dec., 1904,
R. 1.
24 Sept., 1891,
R. 2.

See *Re Irvine* (1909) 26 W.N. 152.

(c) Students-at-law who have been such students for the prescribed period and have complied with all the requirements of these Rules.

(d) Solicitors of the Court of five years' standing from the date of their admission in New South Wales, whose names have been, on their own application, removed from the roll of solicitors in the Court.

1898, No. 22,
sec. 11.

See Legal Practitioners Act 1898, s. 11, S.C.P., p. 297.

5. The board shall meet in the Judges' consultation room on the first and last Wednesdays in each term, if required, or on such other dates as the Attorney-General may appoint.

Board Meetings,
24 Sept., 1891,
R. 1.

6. At any meeting three members of the Board shall form a quorum.

7. During each year the Board shall appoint as examiners for the ensuing year—

Examiners.
24 Sept., 1891,
R. 17.

(a) The Professor of Law of the University of Sydney and two practising barristers, or such other persons as may be approved, for the final examination in law;

(b) The Professor of Law of the University of Sydney or such other person as may be approved for the intermediate examination in law.

(c) Two or more professors of the University of Sydney or such other persons as may be approved for the preliminary examination.

8. All examiners may continue to act as examiners until their successors have been appointed.

Tenure of office. *Ibid.*

9. The Board may at any time, if necessary, appoint any approved person as examiner, either generally or for any limited time or purpose.

Limited appointments.
Ibid.

Studentship at Law.

10. The following persons only shall be eligible for admission as students-at-law:—

Qualifications of Students-at-Law.

(a) Graduates of a University as defined in Rule 3.

Ibid., R. 4.

- (b) Persons who have passed two annual examinations at the University of Sydney and who shall thereafter become graduates.
- (c) Persons who have passed two annual examinations at the University of Sydney and also the preliminary examination in History.
- (d) Persons who have passed the preliminary examination.

Notice for
admission.
24 Sept., 1891,
R. 3.

11. Every person applying for admission as a student-at-law, or for admission to the preliminary examination, shall give written notice of his application to the Secretary before the commencement of any term.

Certificates of
character.
Ibid.

12. Such notice must be accompanied by certificates from two or more persons resident in the State, that they are well acquainted with the applicant, and that he is a person of good fame and character.

Other
evidence as to
character.
Ibid.

13. The Board may require such further or other evidence as to the good fame and character of any applicant as it deems necessary.

Term of
studentship.
Ibid., R. 5.

14. No student-at-law shall be admitted as a barrister until he has been a student-at-law for at least two years; nor shall any person admitted a student-at-law under sub-clauses (c) and (d) of Rule 10 be admitted as a barrister until he has been a student-at-law for at least three years.

Terms kept in
England or
Ireland.
Ibid.

15. Any person who produces a certificate that he has kept four terms as a student-at-law of any English or Irish Inn of Court may be allowed to count the same as equivalent to one year as a student-at-law under these rules.

Residence
condition.
Ibid., R. 6.

16. During studentship every student-at-law shall be a *bona fide* resident in this State, provided that residence in London when keeping terms at an Inn of Court shall not be held to be a contravention of this rule.

Exemption
from.

17. The Board may in any case excuse any student-at-law from compliance with the preceding rule.

Commence-
ment of
studentship.
15 Dec., 1904.

18. The studentship of any student-at-law admitted under sub-clause (d) of Rule 10 shall commence from the last day of the preliminary examination.

Service under
articles.
10 Mar., 1893.

19. A student-at-law may, during the term of his studentship, enter into or continue to serve under Articles of Clerkship with a solicitor of the Court, provided that no such student shall be admitted as a barrister until such Articles of Clerkship have expired or been determined.

Examinations.

Time and
place of
examination
9 Mar., 1900,
R. 1.

20. All examinations shall be held during the second week in term, at such place and time and subject to such conditions as the Board may appoint and direct: Provided that the Board may, if it thinks fit, determine upon any other time for the holding of such examinations.

21. The preceding rule shall not affect in any way examinations held by the University of Sydney, and shall not apply to a student-at-law who is proceeding to the examination of Bachelor of Laws in the said University. Except for LL.B. students. 9 Mar., 1900, R. 2.

22. The examinations under these rules shall be:—

Examinations.

- (a) A preliminary examination.
- (b) An intermediate examination in Law.
- (c) A final examination in Law.

23. The subjects of the preliminary examination shall be Latin, Geometry, Algebra, History, and either Greek, or French Language and Literature, or Logic; the standard of proficiency required shall be equal to that of the Second Annual Examination in the University of Sydney, so far as such standard is capable of being applied to the subjects prescribed. Preliminary examinations. 24 Sept., 1891, R. 10.

24. The subjects of the intermediate examination in Law shall be Roman Law, International Law, and Constitutional Law. Intermediate examination. Ibid., R. 11.

25. The subjects of the final examination in Law shall be as follows:— Final examination. 22 Sept., 1903, R. 1.

Section I.—(a) The Law of Real and Personal Property; (b) Equity, Bankruptcy, Probate, and Divorce, and Practice in those Jurisdictions; and (c) General Paper.

Section II.—(a) Contracts; (b) Torts and Crimes; and (c) Procedure at Common Law in Civil and Criminal Cases, together with Pleading and Evidence.

26. As soon as possible after any examination the Examiners shall forward to the Secretary the questions and answers of each candidate, together with a report, which shall state whether the answers are "very satisfactory," "satisfactory," or "not satisfactory" in each subject. Reports by examiners. 24 Sept., 1891, R. 18.

27. The Secretary shall place such reports before the Board at the first meeting held after the receipt by him of all the reports relating to any examination, whereupon the Board shall determine whether each candidate has passed the examination or must present himself again for the whole or any portion of the subjects comprised in the examination. Consideration of reports. Ibid.

28. The Board shall from time to time notify the books which are to be set for all or any of the examinations. Provided that at least six months' notice shall be given of any change in such books, or any of them. Until altered, the books for the examinations shall be those set out in the First Schedule. Subjects of examination.

29. Every student at law shall pass the intermediate law and the final law examinations, and may present himself for examination as follows:— Time for sitting for examinations. 24 Sept., 1891, R. 14; 22 Sept., 1903, R. 2.

Intermediate law examination.—Six months after being admitted a student-at-law.

Final examination.—Section I.—Nine months after first presenting himself for the Intermediate Law Examination.

Final examination.—Section II.—Nine months after first presenting himself for Section I. of the final examination.

Final examination.—Sections I. and II.—Fifteen months after first presenting himself for the intermediate law examination.

Exemption
from
examinations.
24 Sept., 1891,
R.R. 11 and 13.

30. Provided that any student-at-law who has attended the Law lectures appointed by the University of Sydney, and has obtained, or during his studentship obtains, the degree of Bachelor of Laws of the said University, shall not be required to pass the intermediate law examination, nor the final law examination: Provided further that any student-at-law who holds the degree of Bachelor of Laws at a University, or the degree of Bachelor of Civil Laws at the University of Oxford, or who has passed in the First Class of the School of Jurisprudence in the Universities of Oxford or Cambridge, or who has passed an examination in Roman, International, and Constitutional Law at one of the Inns of Court in England or Ireland, shall not be required to pass the intermediate law examination.

This Rule is repealed by Rule of 25th May, 1908, *post*.

Re-examina-
tion.
Ibid., R. 20.

31. If any candidate fails to pass any examination under these rules he may from time to time present himself for re-examination in the whole or any part of such examination in any subsequent term. The Board may, however, in any case, if it thinks fit, refuse to allow a candidate to present himself for examination.

Preliminary
examination.
Ibid., R. 19.

32. If a candidate in the preliminary examination fails in one subject only, but passes in three of the remaining subjects very satisfactorily, the Board may resolve that the candidate has satisfactorily passed the said examination.

Failure in
preliminary
examination.
9 Mar., 1900,
R. 3.

33. If a candidate in the preliminary examination fails to pass very satisfactorily in two subjects, or satisfactorily in three subjects, any re-examination must extend to all subjects.

Failure in other
examinations.
Ibid., R.R. 4 &
5; 22 Sept.,
1903, R. 4.

34. If a candidate in the intermediate law examination, or in either section of the final law examination, fails to pass very satisfactorily in one subject, or satisfactorily in two subjects, any re-examination must extend to all the subjects of such examination, or of such section.

Examinations
held before
lapse of time.

35. A candidate may proceed to any examination at any time not exceeding twenty-one days before the earliest date fixed by these rules for such examination.

Notice to
proceed to
examination.
24 Sept., 1891,
R. 7.

36. Every student-at-law desirous of proceeding to the intermediate or final examination, or any section thereof, shall, before the commencement of the term in which such examination is to be held, give written notice to the Secretary of his desire.

Notice to
candidate.
Ibid.

37. Two days' notice of the time and place of examination shall be given by the Secretary to each candidate admitted by the Board to such examination.

Fees.

Fees.
9 Oct., 1899;
20 Dec., 1895;
9 Mar., 1900,
R. 6; 22 Sept.,
1903, R. 3.

38. The fees for the preliminary and law examinations shall be as follows:—

Preliminary examination or re-examination: Twenty guineas.

Intermediate law examination or re-examination: Ten guineas.

Final examination or re-examination, each section: Ten guineas.

Re-examination in three subjects of preliminary examination:
Fifteen guineas.

Re-examination in any two subjects: Ten guineas.

Re-examination in any one subject: Five guineas.

Such fees shall be paid to the Secretary at the time of giving notice of application for examination.

39. Any person applying for admission as a barrister under subclause (b) of Rule 4 shall pay to the Secretary the sum of £25, to be expended in aid of the Supreme Court Library.

Fees by
Victorian, &c.,
barrister.
15 Dec., 1904,
R. 1 (b).

40. Every person applying for admission as a barrister, or as a student-at-law, and every person applying for admission to any examination or re-examination, shall at the time of such application pay to the Secretary a sum of one guinea, which shall be retained by him: Provided, however, that this rule shall not apply to the persons mentioned in subclause (a) of Rule 4.

Fee to
Secretary.
9 Oct., 1899;
9 March, 1900,
R. 6; 22 Sept.,
1903, R. 3;
15 Dec., 1904,
R. 1 (e).

41. The fees for the examinations shall be paid by the Secretary to the Examiners by whom the examinations are being conducted.

Disposal of
fees.

Admission.

42. Every person applying for admission as a barrister of the Court shall give one day's notice of his intended application to the Secretary.

Notice of
application.

43. Every person so applying for admission under subclause (a) of Rule 4 shall produce, on his application, or at such other time as the Court determines, a certificate of his admission in Great Britain or Ireland, or such other evidence thereof as the Court considers sufficient.

Evidence on
application by
English
barrister.

Repealed by Rule of 1st December, 1909, *post*.

44. Every person so applying for admission under subclause (b) of Rule 4 shall produce a certificate under the hand of the Chief Justice of the Court in which he was admitted, setting forth the fact of his admission as a barrister, and recommending him as a fit and proper person to be admitted a barrister of the Court.

Evidence on
application by
Victorian, &c.,
barrister.
15 Dec., 1904,
R. 1 (a).

45. Every person so applying for admission under subclause (d) of Rule 4 shall file an affidavit in Form No. 1 contained in the Second Schedule.

Evidence on
application by
a solicitor.

Repealed by Rule of 1st December, 1909, *post*.

46. Every student-at-law so applying shall lodge with the Secretary a declaration in Form No. 2 contained in the Second Schedule, and also certificates from two or more persons resident in the State, that they are well acquainted with the applicant, and that he is a person of good fame and character.

Proof of
residence and
character.
24 Sept., 1891,
R. 6.

Rules—16th November, 1906—Admission of Barristers.

Certificate of Board.
24 Sept., 1891,
R. 22.

47. No such student-at-law shall be entitled to be admitted a barrister of the Court until the Board certifies that he has complied with these Rules and is eligible for admission. The Board may give such certificate subject to any condition it considers desirable.

Personal appearance in Court required.
Ibid., R. 22;
15 Dec., 1904,
R. 1 (c).

48. No person shall be admitted as a barrister of this Court unless a motion for his admission is made in open Court, and unless the applicant be present in Court when such motion is made.

Practising as barrister.
15 Dec., 1904,
R. 1 (d).

49. No person shall be entitled, by virtue of his admission as a barrister, to practise in New South Wales in any other capacity than that of a barrister.

Miscellaneous.

Failure to comply with rules.
16 Feb., 1899.

50. If any person applying for admission as a student-at-law, or as a barrister, fails in the strict observance of the requirements of these Rules, the Board, notwithstanding anything contained in these Rules, if satisfied that such failure was occasioned by accident, mistake, or other sufficient cause, may dispense with a literal compliance with these Rules.

Secretary.
24 Sept., 1891,
R. 24.

51. The Chief Clerk of the Court, or such other person as the Board may appoint, shall be Secretary to the Board, and shall attend all meetings of the Board, keep minutes of its proceedings, conduct its correspondence, and perform such other duties as the Board may require.

FIRST SCHEDULE.

Preliminary Examination.

1. *Greek*.—Translations from the Iliad, First 4 Books; The Antigone of Sophocles; Herodotus, 2nd Book; or
French Language and Literature.—Any two of the following books to be selected by the Candidate, viz.:—
Montesquieu's "Esprit de Lois."
Racine's Tragedies.
The following four of Moliere's Plays:—
Le Misanthrope, L'Avare, Tartufe, Les Fourberies de Scapin.
Rousseau's Contrat Social.
Sainte-Beuve's Causeries du Lundi, volume I; or
Logic.—Whateley's Logic, and Locke on the Human Understanding.
2. *Latin*.—Translations from Cicero de Officiis, and 1st and 2nd Orations against Catiline; the Germania of Tacitus; Odes of Horace.
3. *Geometry*.—The substance of Euclid, Books I-IV. Where the candidates do not follow Euclid's Elements they should state what text-book of Geometry they have studied. Among the newer books, Hall and Knight's School Geometry, Parts I-IV, is recommended.
4. *Algebra*.—To Quadratic Equations inclusive.
5. *History*.—Hallam's Constitutional History, and Middle Ages, 5th, 6th, and 8th Chapters; Creasy on the Constitution; Stephen's Commentaries, Introduction and Concluding Chapter.

Intermediate Law Examination.

1. *Roman Law*—
(i) "The Institutes of Justinian," Books I and II; Book III, Title 13 to the end of the Book; Book IV, Titles 1 to 5 inclusive.
Book recommended, Moyle's "Justinian."
(ii) Maine's "Ancient Law."

2. Constitutional Law—

- (i) Dicey, "Introduction to the Study of Law of the Constitution" (3rd or later edition).
- (ii) Anson, "Law and Customs of the Constitution," Part II (1st or later edition), six chapters, viz.:—Chapters (1) The Prerogative of the Crown; (2) Title to Crown-Allegiance; (3) Councils of Crown—Privy Council and Cabinet; (5) Dominions and Dependencies of Crown; (6) Foreign relations; (10) The Courts, omitting section 4 (Courts outside the Supreme Court).
- (iii) The Commonwealth of Australia Constitution Act, 1900, together with the Letters Patent, the Commission and Instructions relating to the office of Governor-General. (A copy of these Instruments will be found in "Statutes of Practical Utility," Vol. IV, pp. 601 to 606.)
- (iv) The Constitution Statute and the Constitution Act, 1902, together with the Letters Patent, the Commission and Instructions relating to the office of Governor of New South Wales. (A copy of these Instruments will be found in the "Statutes of Practical Utility," Vol. IV, pages 607 to 616, whilst both the Acts and Instruments referred to will be found in the "New South Wales Parliamentary Handbook" issued by the Government Printer.)
- (v) Webb, "Imperial Law," Chapter 3 (Introduction of the laws of England into New South Wales and Victoria).

3. International Law—

Lawrence "The Principles of International Law."

Final Law Examination.

Section I.

1. Law of Real and Personal Property:—

- (i) Williams, "Principles of the Law of Real Property," omitting Part III (18th or later edition).*
- (ii) Williams, "Principles of the Law of Personal Property," (14th edition), omitting Part II, chapter 4 (Bankruptcy) and chapter 6 (so far as relates to Joint Stock Companies).*
(Students are advised to study these text-books in conjunction with Millard's "Law of Real Property," and Millard's "Personal Property.")
- (iii) The Registration of Deeds Act, 1897, and the Real Property Act, 1900.

2. Equity, Bankruptcy, Probate, and Divorce, and Practice in those jurisdictions:—

- (i) Snell, "Principles of Equity" (9th or later edition).*
- (ii) The Equity Act, 1901.
- (iii) Williams, "Principles of the Law of Personal Property" Part II, chapters 4 and 6; to be read in conjunction with the Bankruptcy Act, 1898, and the Companies Act, 1899. (A short summary of the local law on these two subjects will be found in Millard's "Personal Property," pp. 127-166 and 192-218).*
- (iv) The Wills, Probate, and Administration Act, 1898, Part II.
- (v) The Matrimonial Causes Act, 1899.

3. General Paper:—

- (i) Beal, "Cardinal Rules of Legal Interpretation."*
- (ii) The Interpretation Act, 1897 (N.S.W.); the Acts Interpretation Act, 1901 (Federal); the Interpretation Act, 1889 (Imperial).
- (iii) The following leading cases, with notes:—(a) From Smith's "Leading Cases at Common Law"; *Lickbarrow v. Mason* (stoppage in transitu); *Miller v. Race* (negotiable instruments); and the *Duchess of Kingston's case* (estoppel); (b) From *White and Tudor's "Leading Cases in Equity,"* *Russell v. Russell* (equitable mortgage by deposit of deeds); *Bassett v. Nosworthy* (purchase for valuable consideration without notice); *Penn v. Lord Baltimore* (Equity acts in personam).

* Where books are marked thus (*) see notice on page 77.

Section II.

1. *Contracts:—*

- (i) Anson, "Law of Contract" (8th or later edition).*
- (ii) Stevens, "Elements of Mercantile Law," Part II (3rd or later edition).*

2. Torts and Crimes:—

- (i) Pollock, "Law of Torts" (6th or later edition).*
- (ii) Harris, "Criminal Law" (8th or later edition).*
- (iii) The Crimes Act, 1900, Parts I to IX.

3. *Procedure at Common Law in Civil and Criminal Cases, together with Pleading and Evidence:—*

- (i) The Common Law Procedure Act, 1899.
- (ii) The District Courts Act, 1901.
- (iii) The Justices Act, 1902.
- (iv) The Crimes Act, 1900, Parts X to XVI.
- (v) Stephen, "Principles of Pleading in Civil Actions" (7th edition).*
- (vi) Stephen, "Digest of the Law of Evidence" (5th or later edition).*
- (vii) The Evidence Act, 1898; the Witnesses Examination Act, 1900: The Accused Persons Evidence Act, 1898; and the State Laws and Records Recognition Act, 1901 (Federal).

SECOND SCHEDULE.

Form No. 1.

**In the Supreme Court
of New South Wales.**

In the matter of the application of A.B., a solicitor of this Court, to be admitted as a barrister.

And in the matter of the Legal Practitioners Act, 1898.

On the _____ day of _____ 190____, A.B., of _____ in the State of New South Wales, solicitor, being duly sworn, makes oath and says as follows:—

1. I was duly admitted as a solicitor of the Supreme Court of New South Wales on the _____ day of _____ 18____
[or as the case may be].

2. I am desirous of having my name removed from the roll of solicitors of this Court for the purpose of being admitted as a barrister of this Court.

3. No application or other proceeding is now pending against me as such solicitor in this Court or elsewhere, nor do I expect or apprehend that any application or proceeding will be made, had, or commenced against me as such solicitor.

Sworn by the Deponent, on the day first
above mentioned, at before
me,—

A Commissioner for Affidavits.

This form, referred to in R. 45, is now repealed and the form given in Rule of 1st December, 1909, *post*, is substituted.

Form No. 2.

I, _____ of _____ in the State of
New South Wales, student-at-law, do solemnly declare and affirm that—

- 1. I was admitted a student-at-law under subclause of Rule 10
of the Rules relating to the admission of Barristers in the Supreme
Court of New South Wales on**

* Where books are marked thus (*) see notice on page 77.

2. From the last-mentioned date to the date of this declaration I have resided in this State [or if not, set out facts as to residence].

And I make this solemn declaration as to the matter aforesaid, according to the law in this behalf made, and subject to the punishment by law provided for any wilfully false statement in any such declaration.

Declared before me, at Sydney, this
day of . A.D. 190 .

Justice of the Peace.

FREDK. M. DARLEY, C.J.

WM. OWEN, J.

H. E. COHEN, J.

G. B. SIMPSON, J.

ROBERT D. PRING, J.

P. W. STREET, J.

C. G. WADE, A.-G.

CHARLES A. COGHLAN.

C. DELOHERY.

Notice to Candidates for the Bar Examination under Appendix C.

1. The English text-books prescribed for this Examination are, in great measure, prescribed for the purpose of indicating the scope and subject-matter of the examination; but, on all subjects where the law in force in New South Wales differs from the English law, candidates are required to make themselves acquainted with the law in force in New South Wales. Text-books or parts of text-books which require to be read in connection with the local statutes are marked with an asterisk.

2. Candidates are reminded that English Statutes passed after the 25th July, 1828, are not in force in this State, except in cases where the enactment has been made binding by the Imperial Parliament, either expressly or by necessary implication. At the same time, a considerable number of English Statutes passed after that date (such as the English Wills Act, 1837), have been expressly adopted by the local Legislature: whilst a considerable number of other local enactments (such as the Bills of Exchange Act, 1887) are based on similar enactments passed in the United Kingdom. As to how far law in force in England prior to the 25th July, 1828 applies in New South Wales, reference may be made to Webb's "Imperial Law." As to how far English Statutes have been adopted by, or embodied in, local legislation, reference may be made to Curlewis' "Table of Statutes."

3. In cases where local Statutes are expressly prescribed as subjects for examination, the examination will be confined, so far as possible, to the general tenor and essential, or more important, provisions of the Statutes referred to: or, in other words, to such matters as would find a place in a student's text-book. The English text-book will serve, to some extent, as a guide in this matter. Candidates may also obtain a few copies of previous papers, for the purpose of guidance, on applying to the secretary to the Board.

4. Candidates are reminded that the State Laws on some of the subjects included in these examinations are liable to be superseded by Federal Legislation: whilst on other subjects the existing Acts are likely to be displaced by Consolidated Acts. Candidates are further reminded that they are liable to be examined in any Acts or Rules relating to the subjects of these examinations passed or made by either the State or the Federal Parliament more than six calendar months prior to the date at which such examinations may be held.

5. Where chapters, sections, or pages are referred to, the reference is to be deemed "inclusive" unless otherwise expressed.

RULES 4th NOVEMBER 1907.

Made on 4th day of November, 1907.

RULES UNDER THE LOCAL GOVERNMENT ACT, 1906.

In pursuance of the powers vested in us we do order and direct as follows:

1. In the following rules, unless the context or subject matter otherwise indicates or requires,—

“Court” means the Supreme Court of New South Wales.

“Appeal Court” means the Court of Petty Sessions, or the District Court against whose decision an appeal is being made.

“Appellant” means the party to a cause or matter who is appealing to the Court.

“Respondent” means any other party to a cause or matter.

2. Any person desirous of appealing under section 140, Part XIX, of the Local Government Act, 1906, to the Court from the decision of any Appeal Court shall, within sixteen days from the said decision, apply in writing to the said Appeal Court to state and sign a case for the opinion of the Court.

3. The appellant shall, within seven days of receiving the case, serve notice in writing of such appeal, together with a copy of the case as stated and signed, on the respondent, and shall thereafter and within the said time transmit such case to the Prothonotary of the Court.

4. When a Special Case from any Appeal Court has been transmitted to the Prothonotary it shall be filed and set down for hearing before the Court on a day not less than seven days from the filing thereof, unless the written consent of both parties to the case being heard at an earlier date is filed.

5. As soon as the case is filed a notice thereof shall be served by the appellant upon the respondent or his solicitor.

6. All notices and other documents which by these rules have to be served upon any party to the proceedings may be served by being left with the party or his solicitor, or the Sydney agent of such solicitor, or by being sent through the post in a prepaid registered envelope addressed to such party at his last known place of abode.

7. The Court or a Judge thereof may at all times, upon such terms and conditions as to costs or otherwise as it or he thinks fit,—

(1) enlarge or abridge the times allowed under these rules for the doing of any act; and

(2) amend any proceedings or any case, notice, order, affidavit, or other document coming within the provisions of these rules. Provided that any enlargement of time may be ordered although the

application for the same is not made until after the expiration of the time allowed.

FREDK. M. DARLEY, C.J.
G. B. SIMPSON, J.
ROBERT D. PRING, J.

These Rules are made in pursuance of s. 140 of the Local Government Act, No. 56, 1906.

See also Rule of 15th December, 1904, *ante*, p. 59, by which three copies (printed or typewritten) of any special case are to be lodged, in addition to the copy filed.

RULES—5th NOVEMBER, 1907.

In the Supreme Court
of New South Wales.

Tuesday, the fifth day of November, 1907. .

RULES UNDER THE MINING ACT, 1906.

In pursuance of the powers vested in us we do order and direct as follows:—

1. In the following rules, unless the context or subject-matter otherwise indicates or requires,—

“Court” means the Supreme Court of New South Wales.

“Appellant” means the party to a cause or matter who is appealing to the Court.

“Respondent” means any other party to a cause or matter.

“Minister” means the Secretary for Mines.

2. Any person desirous of appealing under the 159th section of the Mining Act 1906, shall file in the Court a notice in the Form No. 1, contained in the Schedule hereto, or to the like effect.

Power to make Rules dealing with appeals under the above mentioned section is conferred by s. 160 of the Mining Act 1906.

3. Such notice shall be filed within fourteen days from the time when the appellant received notification of the amount at which the value of the land or interest in question has been assessed.

4. Within the same time a copy of such notice shall be served upon the respondent or his solicitor.

5. Within fourteen days from the filing of such notice the appellant shall file a written appointment of an assessor upon his behalf, and also an affidavit of service of the said notice of appeal.

6. Within fourteen days from the service of the said notice of appeal the respondent, if no agreement dispensing with assessors has been made, shall file a written appointment of an assessor upon his behalf.

7. If either party fails to appoint an assessor as required, his opponent may apply to a Judge of the Court on summons for an order appointing an assessor on behalf of the party in default.

8. If the parties agree that the appeal may be heard and determined by the Judge appointed in that behalf without assessors, the agreement shall be filed and it shall not be necessary for the parties or either of them to appoint any assessors.

9. An appellant may at any time abandon his appeal by filing a notice of abandonment, and serving a copy of such notice upon the respondent. The latter shall thereupon become entitled to tax his costs of the appeal up to the time of service of such notice. If such costs are not paid within seven days of the taxation, the respondent may apply to a Judge of the Court on summons for an order for the payment thereof.

10. As soon as assessors have been duly appointed, or an agreement dispensing with assessors has been filed, the appellant may set the matter down for hearing.

11. If the appellant neglects to set the matter down for hearing for a period of seven days from the time when he became entitled so to do, the respondent may set it down for hearing or may apply to a Judge of the Court on summons to have the appeal dismissed.

12. Seven days' notice of the day appointed for the hearing of the case shall be given by the party who set it down for hearing to the other party; provided that the Judge may direct longer or shorter notice to be given.

13. After the cause has been heard an order shall be drawn up setting out the value determined by the Court constituted under the 159th section of the Mining Act, 1906, and directing the costs of the appeal to be paid by the unsuccessful party.

14. Such order shall be signed by the Prothonotary or the Chief Clerk on his behalf.

15. Every appeal to the Court under the 167th section of the Mining Act, 1906, shall be by notice in the Form No. 2, contained in the Schedule hereto, or to the like effect, and shall be directed to the respondent or his solicitor and to the District Court Judge from whose decision the appeal is being made.

Power to make Rules dealing with appeals under the section above-mentioned is conferred by sub-s. 2 of the same section.

By sub-s. 3 the appeal is to be set down for argument in the same manner as special cases in actions at law. Apparently three copies of the case should be lodged in accordance with the Rule of 15th December, 1904, *ante*, p. 59.

16. Such notice shall be filed with the Registrar of the Mining Appeal Court, and copies of such notice shall be served upon the District Court Judge and each respondent or his solicitor, respectively, within fourteen days from the decision from which the appeal is being made.

17. Within seven days from the filing of the said notice of appeal, the security required by the 167th section of the Mining Act,

1906, or the deposit in lieu thereof, shall be given or lodged with the Registrar of the Mining Appeal Court.

18. The District Court Judge shall thereupon sign a statement of the case with the written assent of both parties or their solicitors, or, if they do not agree, without such assent.

19. On such statement, together with a copy of the notice of appeal and an affidavit of service thereof, being filed in the Court, the appeal shall be set down for hearing.

20. Any person desirous of appealing under Division 2 of Part VIII of the Mining Act, 1906, to the Court from the determination of a Warden shall, within seven days from the said determination, apply in writing to the said Warden to state and sign a case for the opinion of the Court.

Power to make Rules regulating appeals under the abovementioned Div. 2 of Part VIII. of the Mining Act is conferred by s. 174 of that Act.

Apparently three copies of the case should be lodged in accordance with the Rule of the 15th December, 1904, *ante*, p. 59.

21. When a Special Case from a Warden's Court has been transmitted to the Prothonotary it shall be filed and set down for hearing before a Judge in Chambers unless the written consent of both parties to its being heard by the Full Court in the first instance is filed. But in every case the Judge hearing the matter may, if he thinks fit, refer it to the Full Court.

22. The case shall be set down for hearing on a day not less than seven days from the filing thereof, unless the written consent of both parties to the case being heard at an earlier date is filed.

23. As soon as the case is filed a notice thereof in the Form No. 3, contained in the Schedule hereto, or to the like effect, shall be served by the appellant upon the respondent or his solicitor.

24. All notices or other documents which by these rules have to be served upon any party to the proceedings may be served by being left with the party or his solicitor, or the Sydney Agent of such solicitor, or by being sent through the post enclosed in a prepaid registered envelope addressed to such party at his last known place of abode.

25. In all cases where a document is served by post, it shall be deemed to have been served on the day upon which it would be delivered in the ordinary course of the post.

26. The Court or a Judge thereof may at all times, upon such terms and conditions as to costs or otherwise as it or he thinks fit,—

- (1) enlarge or abridge the times allowed under these rules for the doing of any act; and
- (2) amend any proceeding or any case, notice, order, affidavit, or other document coming within the provisions of these rules.

Provided that any enlargement of time may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed.

THE SCHEDULE.

Form No. 1.

In the Supreme Court
of New South Wales.

In the matter of the Resumption of certain lands under the provisions
of the Mining Act, 1906, and in the matter of the claim of A.B.,
of

A.B. (or The Minister),
Appellant.
The Minister (or A.B.),
Respondent.

Notice of Appeal.

Take notice that , the appellant herein, is dissatisfied with the amount of the value assessed by C.D. (Warden, or as the case may be) in respect of the interest of the abovenamed A.B. in all that (here describe the land resumed in the same manner as it is described in the notification of resumption published in the Government Gazette), and that he intends to appeal to the Supreme Court.

Dated this day of , 19 .

(Signed by the Appellant, his Counsel, or Solicitor.)

To the abovenamed Respondent.

Form No. 2.

In the Supreme Court
of New South Wales.

In the matter of the appeal pending in the District Court for , sitting as a Mining Appeal Court, under the provisions of the Mining Act, 1906.

A.B.,
Appellant.
C.D.,
Respondent.

Notice of Appeal.

Take notice that A.B., the appellant herein, intends to appeal to the Supreme Court against the determination and direction made herein on the day of , 19 , to the effect that (here set out the determination or direction against which it is desired to appeal), on the following grounds (here set out the grounds).

Dated this day of , 19 .

(Signed by the Appellant, his Counsel, or Solicitor.)

To (District Court Judge)
and to C.D., the abovenamed Respondent, or his Solicitor.

Form No. 3.

In the Supreme Court
of New South Wales.

In the matter of certain proceedings in the Warden's Court of the Mining District at , and in the matter of the Mining Act, 1906.

A.B.,
Appellant.
C.D.,
Respondent.

Notice of Hearing.

Take notice that the special case in this matter has been filed in the Supreme Court this day, and has been set down for hearing before the Judge in Chambers on the day of , 19 , at o'clock in the noon (or before the Full Court on the day of , 19 , or as the case may be).

Dated this day of , 19 .

(Signed by the Appellant, his Counsel, or Solicitor.)

To C.D.,
The abovenamed Respondent.

FREDK. M. DARLEY, C.J.
H. E. COHEN, J.
ROBERT D. PRING, J.

RULES—16th MARCH, 1908.

Monday, the sixteenth day of March, A.D. 1908.

In pursuance of all powers vested in us we do order and direct as follows:—

1. Upon request being made by any Solicitor for the execution of any process or for any work for which fees are properly chargeable in the Sheriff's office the Sheriff may require a deposit of money to meet such fees. He may also require an undertaking in writing to pay any further fees which may become payable beyond the amount so deposited.

2. In any case in which any Solicitor has deposited an amount in excess of the fees which shall be found to be payable, the Sheriff shall, upon the amount actually payable being ascertained, return to the said Solicitor the amount so deposited in excess.

3. Upon default being made by any Solicitor in payment of fees properly chargeable in the Sheriff's office for a period of seven days after demand in writing by the Sheriff, he may report to the Court the name of the Solicitor so making default and the Court may thereupon make all necessary orders to enforce payment of such fees, and the Sheriff may, with the consent of the Attorney-General, commit to the Crown Solicitor the conduct of such matter.

FREDK. M. DARLEY, C.J.
ROBERT D. PRING, J.
R. M. SLY, J.

Tuesday, the seventeenth day of March, A.D. 1908.

In pursuance of all powers vested in us we do order and direct as follows:—

1. Where under the Foreign Tribunals Evidence Act, 1856, or the Extradition Act, 1870, section 24, any civil or commercial matter, or any criminal matter is pending before a Court or tribunal of a foreign country, and it is made to appear to the Court or a Judge by Commission Rogatoire, or letter of request, or other evidence as hereinafter provided, that such foreign court or tribunal is desirous of obtaining the testimony, in relation to such matter of any witness or witnesses within the jurisdiction, the Court or a Judge may, on the *ex parte* application of any person shown to be duly authorised to make the application on behalf of such foreign court or tribunal, and on production of the Commission Rogatoire, or letter of request, or of a certificate under section 2 of the Foreign Tribunals Evidence Act, 1856, or such other evidence as the Court or a Judge may require, make such order or orders as may be necessary to give effect to the intention of the acts abovementioned in conformity with section 1 of the Foreign Tribunals Evidence Act, 1856.

The Statutes above mentioned are the Imperial Statutes 19 & 20 Vict. c. 113, and 33 & 34 Vict. c. 52. The former Act provided for the taking of

evidence in Her Majesty's Dominions in relation to civil and commercial matters pending before foreign tribunals ; and s. 24 of the latter Act extended the powers given by the former Act so as to include criminal matters.

No express power seems to be given to the Judges to make Rules ; by s. 6 of the first mentioned Act such power is given to the Lord Chancellor and the Common Law Judges at Westminster.

2. An order made under the last preceding rule shall be in the form numbered 1 in the schedule to these rules with such variations as circumstances may require.

3. The examination may be ordered to be taken before any fit and proper person nominated by the person applying, or before any officer of the Court, Commissioner for taking affidavits, or such other qualified person as to the Court or Judge may seem fit.

4. Unless otherwise provided in the order for examination, the person before whom the examination is taken shall on its completion forward the same to the Prothonotary, and on receipt thereof he shall append thereto a certificate in the form numbered 2 in the schedule to these rules with such variations as circumstances may require, duly sealed with the seal of the Court, and shall forward the depositions so certified, and the Commission Rogatoire or letter of request, if any, to His Majesty's Secretary of State for Foreign Affairs for transmission to the foreign Court or tribunal.

5. Where so directed by the order for examination or by any subsequent order the Prothonotary shall, instead of transmitting the depositions and other documents to His Majesty's Secretary of State for Foreign Affairs, transmit the same to the Consul or other consular representative in New South Wales of the Government under which such foreign Court or tribunal is constituted.

6. An order made under Rule 1 hereof, may, if the Court or a Judge thinks fit, direct the examination to be taken in such manner as may be requested by the Commission Rogatoire or letter of request from the foreign Court, or therein signified to be in accordance with the practice or requirements of such Court or tribunal, or which may for the same reason be requested by the applicant for such order. If no special direction is given in the order such examination shall be taken in the manner prescribed by the rules and practice of the Court.

7. The foregoing provisions shall apply as far as practicable to any letter of request from any British tribunal out of the jurisdiction.

8. Where a Commission Rogatoire or letter of request is transmitted to the Court by His Majesty's Secretary of State for Foreign Affairs with an intimation that it is desirable that effect should be given to the same without requiring an application to be made to the Court by the agents in New South Wales of any of the parties to the action or matter in the foreign country, the Prothonotary shall transmit such Commission Rogatoire or letter of request to the Crown Solicitor, who may thereupon, with the consent of the Attorney-General, make such applications and take such steps as may be necessary to give effect to such Commission Rogatoire or letter of request in accordance with these rules.

9. The duties of the Prothonotary under these Rules, may, in his absence, or during his indisposition, or at his request, be performed by the Chief Clerk of the Supreme Court.

SCHEDULE.

Form No. 1.

In the Supreme Court
of New South Wales.

In the matter of the Foreign Tribunals Evidence Act, 1856 (19 and 20 Vic. c 113.) And in the matter of a (Civil or Commercial or Criminal) proceeding now pending before (*description of foreign tribunal*) intituled as follows:—

(*Here copy short title of proceeding.*)

the day of 190 .
Upon reading the affidavit (if any) of the day of sworn the day of and filed herein, and the certificate of (*name and description of the Ambassador, Minister, &c., of the foreign country*) that proceedings are pending in the (*description of foreign tribunal*) in (*name of foreign country*) and that such (*Court or tribunal*) is desirous of obtaining the testimony of (*name of witnesses*) It is ordered (*or I do order*) that the said witnesses do attend before (*name and address of examiner*) who is hereby appointed examiner herein at (*place appointed for examination*) on the day of 19 at o'clock, or on such other day and at such other time as the said Examiner may appoint, and do there submit to be examined upon oath or affirmation touching the testimony so required as aforesaid, and do then and there produce [*description of documents* (if any) *required to be produced.*] And it is further ordered (*or I do further order*) that the said examiner do take down in writing the evidence of the said witness or witnesses according to the rules and practice of the Supreme Court of New South Wales pertaining to the examination and cross-examination of witnesses (*or as may be otherwise directed*) and do cause each and every such witness to sign his or her depositions in his the said examiner's presence and do sign the depositions taken in pursuance of this order, and when so completed do transmit the same together with this order to the Prothonotary, Supreme Court, King-street, Sydney [*if so directed.*] And it is also ordered (*or I do also order*) that the Prothonotary do transmit such depositions, together with this order and the Commission Rogatoire or letter of request to the Consul (*or as the case may be*) in Sydney for (*name of foreign country.*)]

Form No. 2.

I, , Prothonotary of the Supreme Court of New South Wales, hereby certify that the documents annexed hereto are (1) the original order of the said Court (*or of the Honorable Mr. Justice A, a Judge of the said Court*) dated the day of 19 , made in the matter of pending in the (*name of Court or tribunal*) at (*place and country where Court is held*) directing the evidence of certain witnesses to be taken before , and (2) the examination and depositions taken by the said pursuant to the said order and duly signed and completed by him on the day of 19 .

GIVEN under my hand and the Seal of the Supreme Court of New South Wales this day of 19 .

Prothonotary.

FREDK. M. DARLEY, C.J.
H. E. COHEN, J.
ROBERT D. PRING, J.
R. M. SLY, J.

In the Supreme Court
of New South Wales.

Monday, the twenty-fifth day of May, 1908.

In pursuance of all the powers vested in us, We Do Order and Direct that Rule 30 of the Rules of the 16th day of November, 1906, relating to the Admission of Barristers, be, and the same is, hereby repealed, and that the following rule be substituted therefor:—

Provided that any Student-at-law who has attended the Law Lectures appointed by the University of Sydney, and has obtained, or during his studentship obtains, the degree of Bachelor of Laws of the said University, shall not be required to pass the intermediate law examination, nor the final law examination: Provided further, that any Student-at-law who has passed the intermediate examination for the degree of Bachelor of Laws in the University of Sydney, or who holds the degree of Bachelor of Laws at a University, or the degree of Bachelor of Civil Laws at the University of Oxford, or who has passed in the First Class of the School of Jurisprudence in the Universities of Oxford or Cambridge, or who has passed an examination in Roman, International, and Constitutional Law at one of the Inns of Court in England or Ireland, shall not be required to pass the intermediate law examination.

FREDK. M. DARLEY, C.J.
H. E. COHEN, J.
ROBERT D. PRING, J.
P. W. STREET, J.
R. M. SLY, J.

RULES—27th NOVEMBER, 1908.

SPECIAL INDORSEMENT.—FURTHER TIME TO PLEAD.

Friday, the twenty-seventh day of November, A.D. 1908.

In any action in which the Writ of Summons has been specially indorsed under the 24th Section of the Common Law Procedure Act and a declaration has been filed containing counts in respect of the causes of action so indorsed no application for further time to plead will be granted unless consented to or supported by an affidavit showing sufficient grounds for an extension of time.

FREDK. M. DARLEY, C.J.
G. B. SIMPSON, J.
H. E. COHEN, J.
ROBERT D. PRING, J.
R. M. SLY, J.

RULES—1st DECEMBER, 1909.

In the Supreme Court
of New South Wales.

Wednesday, the first day of December, 1909.

In pursuance of all powers vested in us, as members of the Barristers' Admission Board, or as Judges of the Supreme Court of New South Wales, we do order and direct as follows :—

Rules 43 and 45 of the Rules of the 16th November, 1906, and Form No. 1 in the Second Schedule to the said Rules, are hereby repealed, and the following Rules and Form substituted therefor :—

43 Every person so applying for admission under sub-clause (a) of Rule 4 shall produce, on his application, or at such other time as the Court determines, a certificate of his admission in Great Britain or Ireland, or such other evidence thereof as the Court considers sufficient.

Every such person shall also file an affidavit stating how he has been employed since his admission in Great Britain or Ireland, and may be required to produce evidence of character.

45. Every person so applying for admission under sub-clause (d) of Rule 4 shall, seven days before such application, serve written notice thereof upon the Honorary Secretary to the Council of the Bar of New South Wales, and also upon the Secretary of the Incorporated Law Institute. He must also file an affidavit in Form No. 1 contained in the Second Schedule.

FORM NO. 1.—This seems to refer to the form following.

G. B. SIMPSON, A.C.J.
H. E. COHEN, J.
ARCHD. H. SIMPSON, C.J. in Eq.
ROBERT D. PRING, J.
P. W. STREET, J.
R. M. SLY, J.

Form No. 1.

In the Supreme Court
of New South Wales.

In the matter of the application of A.B., a Solicitor of this Court, to be admitted as a Barrister.

And in the matter the Legal Practitioners' Act, 1898.

On the _____ day of _____ 19____, A.B., of _____ in the State of New South Wales, Solicitor, being duly sworn, makes oath, and says as follows:—

1. I was duly admitted as a Solicitor of the Supreme Court of New South Wales on the _____ day of _____ 18____, (or as the case may be).
2. Since that date I have been engaged in the practice of my profession as a Solicitor at _____ (or as the case may be).
3. I am desirous of having my name removed from the Roll of Solicitors of this Court for the purpose of being admitted as a Barrister of this Court.

4. No application or other proceeding is now pending against me as such Solicitor in this Court or elsewhere, nor do I expect or apprehend that any application or proceeding will be made, had, or commenced against me as such Solicitor.
5. On the day of instant (or last) I handed (or caused to be handed) to the Honorary Secretary to the Council of the Bar of New South Wales, and also to the Secretary to the Incorporated Law Institute, a written notice of this application.

Sworn by the Deponent on the day first
above-mentioned at before
me,—

A Commissioner for Affidavits.

RULES—2nd DECEMBER, 1909.

Thursday, the second day of December, 1909.

It is hereby ordered that Rules 470 and 483 of the Rules of the 22nd December, 1902, and Form No. 37 in the First Schedule thereto, be, and the same are hereby repealed, and the following Rule and Form substituted therefor:—

470. Every person desirous of presenting himself for the Matriculation Examination of the University of Sydney under subsection (a) of Rule 436, shall give notice thereof to the Secretary, and pay to him a fee of five pounds, not less than sixteen days before the day appointed for such examination.

This Rule is now repealed; see Rules 10th Dec., 1912, *post*.

483. Every person applying for admission under sub-clause (h) of Rule 428 shall, seven days before such application, serve written notice thereof upon the Secretary to the Incorporated Law Institute, and also upon the Honorary Secretary of the Council of the Bar of New South Wales. He must also file an affidavit in Form No. 37 contained in the First Schedule.

Rules 476 and 482 inclusive shall not apply to any such person.

G. B. SIMPSON, A.C.J.
H. E. COHEN, J.
ROBERT D. PRING, J.

Form No. 37.

In the Supreme Court
of New South Wales.

In the matter of A.B., a Barrister-at-Law, and the "Legal Practitioners' Act, 1898."

On the day of in the year one thousand nine hundred and , A.B., of Sydney, in the State of New South Wales, Barrister-at-Law, being duly sworn, makes oath and says as follows:—

1. I was admitted as a Barrister by this Honorable Court on the day of in the year one thousand eight hundred and .
2. Since that date I have been engaged in the practice of my profession as a Barrister-at-Law at (or as the case may be).
3. I am desirous of having my name removed from the Roll of Barristers in this Honorable Court with a view to being admitted

as a Solicitor of this Honorable Court, under and by virtue of
"The Legal Practitioners Act, 1898."

4. On the day of instant (or last) I
handed (or caused to be handed) to the Secretary of the Incorporated Law Institute and also to the Honorary Secretary of the Bar of New South Wales a written notice of this application.

Sworn by the Deponent on the day first
above mentioned, at Sydney, before
me,—

A Commissioner for Affidavits.

RULES—17th DECEMBER, 1909.

Friday, the 17th day of December, 1909.

I. is hereby ordered that Rule 448 of the Rules of the 22nd December, 1902, be rescinded, and the following Rule substituted therefor :—

448. All Examinations shall be held in Sydney, at such place and on such days during each term as the Board shall appoint : Provided that examinations may be held at such country towns as may from time to time be directed by the Judges, or any three of them, on such conditions as may be approved by them.

G. B. SIMPSON, A.C.J.
H. E. COHEN, J.
ROBERT D. PRING, J.

In pursuance of the Rule of 17th December, 1909, we hereby direct that Examinations by the Solicitors' Admission Board may be held at the following country towns :—

Broken Hill,
Deniliquin, and
Lismore,

subject to the services of the Police Magistrate for the district, or of some other person to be approved by the Judges, or any three of them, being available for the supervision of the Examination, to a fee of £2 12s. 6d. being paid by the candidate, in addition to the prescribed examination fee, and to all candidates forwarding to the Secretary notice of their desire to be examined at any such country town at least one month before the Examination takes place.

Dated this 17th day of December, 1909.

G. B. SIMPSON, A.C.J.
H. E. COHEN, J.
ROBERT D. PRING, J.

RULES—21st MARCH, 1910.

Wednesday, the twenty-first day of March, 1910.

The following rules shall apply to the taxation under or pursuant to "The Legal Practitioners' Act, 1898," of the fees, charges, and disbursements of solicitors:—

1. All items of disbursements which the solicitor claims, but has not paid at the time of the delivery of his bill of fees, charges, and disbursements, must be set out under a separate heading in the bill.

2. The bill must expressly state that all such items have not been paid.

3. When any such bill has been prepared in accordance with the preceding rules, but not otherwise, the Taxing Officer may, subject to the provisions of these rules, allow all or any of such items if he is satisfied that the liability of the solicitor to pay the amounts claimed (including fees of counsel) was properly incurred on behalf of his client prior to the delivery of the bill.

4. In no case shall any of such items be allowed unless the amount thereof has been actually paid before the commencement of the taxation.

5. All items of disbursements shall, for the purpose of computation of the sixth of the amount of a solicitor's bill be deemed to be included in and form part of such bill whether such items have been set out under a separate heading or not.

6. In no case shall any disbursement be allowed on taxation unless the Taxing Officer is satisfied that it has been properly made on behalf of the client.

7. Any decision of a Taxing Officer made or given in pursuance of these rules shall be subject to review by the Court or a Judge.

8. The question as to whether any disbursement or payment should be included in the bill or in the cash account, shall be decided by the Taxing Officer independently of these rules.

W. P. CULLEN, C.J.
H. E. COHEN, J.
ROBERT D. PRING, J.
P. W. STREET, J.
R. M. SLY, J.

RULES—7th JULY, 1910.

Thursday, the seventh day of July, 1910.

Rule 33 of the Rules of 22nd December, 1902, is hereby amended by substituting the words "Grafton-Tweed railway line" for the words "Lismore-Tweed railway line" in the last clause thereof.

W. P. CULLEN, C.J.
ROBERT D. PRING, J.
ALEXANDER GORDON, J.

RULES—7th JULY, 1910.

In the Supreme Court
of New South Wales.

Thursday, the seventh day of July, 1910.

Rules 150, 151, 152, 153, 154, 155, 156, 157, 158, 327, 337, and 476 of the Rules of the 22nd December, 1902, and Rules 2 and 4 of the Rules of the 24th November, 1909, are hereby rescinded and the following Rules promulgated in their place :—

The Rules abovementioned are printed in the Supreme Court Practice, except the Rules of the 24th November, 1909, which were Rules dealing with the order of business in the Full Court, and are to be found in the Law Almanac of 1910 ; the Rule next following takes their place.

495. Unless otherwise ordered, matters for hearing before the Full Court shall be taken in accordance with the following directions :

- (a) Any matter which, in the opinion of the Court, should be disposed of immediately, may be heard forthwith, or at such time as the Court appoints.
- (b) Criminal and other Crown cases will have precedence on Fridays.
- (c) Subject to the provisions of clause (a) hereof, Motions generally will have precedence on Mondays and Fridays.
- (d) Subject to the preceding clauses, every matter in the Term paper will be heard in the order in which it is entered in the Term book.

150. Every application for a nonsuit, or for a new trial, or in arrest of judgment, or for judgment *non obstante veredicto*, for or a *venire de novo*, or to enter a verdict, or to increase or reduce the amount of the verdict, shall be by notice of motion, and no *rule nisi* order to show cause or formal proceedings other than such notice of motion shall be made or taken. The moving party shall within eight days (or in causes tried at Circuit Courts within fourteen days) after the trial file a notice of appeal, together with all affidavits to be used in support of such motion. Provided that any such affidavits may, by leave of the Court or a Judge, be filed at a later date.

By this and the following Rules the old practice of moving for a *rule nisi* for a new trial is abolished.

151. Every such notice of motion shall state the day or days on which the cause was tried, the verdict given or other termination of the trial, the motion intended to be made, and the grounds on which it will be made ; and when the party had counsel at the trial shall be signed by one of such counsel.

For cases on signature of the old memorandum by counsel, see S.C.P., p. 398, and *post*, Notes of Cases under reference S.C.P., p. 398.

151a. A copy of every such notice of motion shall be left at the chambers of the Judge before whom the cause was tried on the day on which it is filed, and a copy thereof, and of any affidavit that may be filed in support thereof, shall on the day on which it is filed be served upon each opposing party or upon each solicitor on the record.

152. On or before the last day limited for filing such notice of motion, the moving party shall order a copy of the notes of the Judge before whom the cause was tried, and within eight days after receiving the same shall file a printed copy of such notes, and at the same time lodge three additional printed copies, and shall also within the same time serve four printed copies upon all parties upon whom a copy of the notice of appeal is required to be served : Provided that a Judge may on such conditions as he thinks fit extend the times for ordering, filing, lodging, and serving copies of such notes, or may dispense with the printing or ordering of such notes.

For cases on Judges' Notes under the old practice, see S.C.P., pp. 397, 398, and *post*, Notes of Cases, under reference S.C.P., p. 398.

154. Every such notice of motion shall be for the first day on which the Court sits in Banco after the expiration of sixteen days from the filing of such notice : Provided that no matter in which printed copies of the Judge's notes have to be filed and served shall be called on for hearing before such copies have been filed and served, or the time for so doing has expired, unless the Court or a Judge otherwise directs.

155. The moving party will be restricted upon the hearing to the grounds specified in the notice of motion.

157. The Associate of the Judge who tried the cause shall attend the Court on the hearing of the motion with the issues, exhibits, and other papers, and shall discharge thereafter the duties of the Prothonotary in respect of such motion until the same is disposed of.

158. Where a notice of motion under Rule 150 hereof has been filed and no motion is made when the case is called on for hearing, the motion shall, unless the Court otherwise orders, be dismissed with costs.

158a. Where any such notice of motion is filed it shall not operate as a stay of execution, except in cases where the Judge has reserved any point or given leave to move the Court in respect of any point.

158b. These Rules shall come into force and apply to all matters in which no memorandum of intention to move for a new trial, &c., has been filed on or before the 23rd day of July instant : Provided that in matters in which such memorandum has been filed before that date the memorandum may, upon the consent in writing of all parties, or their Solicitors, being filed, be treated as a notice of motion under these Rules.

W. P. CULLEN, C.J.
ROBERT D. PRING, J.
ALEXANDER GORDON, J.

RULES—13th DECEMBER, 1910.

Tuesday, the thirteenth day of December, 1910.

It is hereby ordered that Rule 1 of the Rules of the 7th November, 1906, relating to appeals from the Dental Board be amended by

omitting the definition of the words "the Board" and by substituting therefor the following definition :—

The words, "the Board," mean the Dental Board appointed under the provisions of the Dentists (Amendment) Act, 1909.

W. P. CULLEN, C.J.

P. W. STREET, J.

ALEXANDER GORDON, J.

RULES—22nd MAY, 1911.

Monday, the twenty-second day of May, A.D. 1911.

It is hereby ordered that the following Rules shall come into force from the date hereof :—

1. Either party may, by notice in writing, at any time not later than eight days before the day for which notice of trial or hearing shall be or has been given, call on the other party to admit, for the purposes of the cause, matter, or issue only, any specific fact or facts mentioned in such notice.

And in case of refusal or neglect to admit the same within five days after service of such notice or within such further time as may be allowed by the Court or a Judge, the costs of proving such fact or facts shall be paid by the party so neglecting or refusing, whatever the result of the cause, matter, or issue may be, unless at the trial or hearing the Court or presiding Judge certifies that the refusal to admit was reasonable, or unless the Court or a Judge at any time otherwise orders or directs.

2. Any admission made in pursuance of such notice is to be deemed to be made only for the purposes of the particular cause, matter, or issue, and not as an admission to be used against the party on any other occasion or in favour of any person other than the party giving the notice.

3. The Court or a Judge may at any time allow any party to amend or withdraw any admission so made on such terms as may be just.

W. P. CULLEN, C.J.

ROBERT D. PRING, J.

R. M. SLY, J.

ALEXANDER GORDON, J.

DAVID FERGUSON, Acting J.

RULES—28th JUNE, 1911.

Wednesday, the twenty-eighth day of June, 1911.

It is hereby ordered that the following Rule shall come into force as and from the date hereof :—

Any matter in which a Notice of Appeal under the Land Tax Assessment Act, 1910 (Commonwealth Act) has been filed shall be entered for hearing before a Judge without a Jury in one of the Cause Lists, and may be so entered by either party.

W. P. CULLEN, C.J.
ROBERT D. PRING, J.
DAVID FERGUSON, Acting J.

NOTIFICATION—SHERIFF'S OFFICE—FEES.

Department of the Attorney-General and of Justice,
Sydney, 21st December, 1911.

It is hereby notified, for general information, that His Excellency the Governor, with the advice of the Executive Council, has been pleased to approve of the following scale of fees to be charged in the Sheriff's Office, under the provisions of the "Sheriff Act, 1900,"—to take effect from the 1st proximo.

W. A. HOLMAN.

SCALE OF FEES TO BE CHARGED IN THE SHERIFF'S OFFICE.

OFFICE FEES.	£	s.	d.
Receiving and entering any writ of ca. re., ca. sa., ne exeat, attachment, or Judges' order	0	10	6
Receiving and entering any process or document, each copy for service	0	5	0
Receiving and entering any other writ of execution.. .. .	0	5	0
Issue of warrant to special bailiff	0	5	0
Issue of warrant in replevin	0	5	0
Poundage under every writ of fi. fa., ca. sa., or Judges' warrant, viz. :—£5 per cent on first £100, and 2½ per cent. above that sum.			
The like under every writ of ha. fa., writ of assistance, &c., on rent or annual value of property delivered.			
Drawing every advertisement and inserting same	0	5	0
On every search, each name	0	1	0
Every copy of a civil jury panel of 16 jurors	0	5	0
Every copy of a civil jury panel of more than 16 jurors	0	10	0
Every bail bond	0	5	0
Assignment of bail bond.. .. .	0	5	0
Assignment of replevin bond	0	2	6
Office copy of any document, per folio of 72 words	0	0	4
Notifying office copy of any writ	0	1	0
Notifying a view within 5 miles of Sheriff's Office	1	1	0
Notifying a view at a greater distance.. .. .	2	2	0
Notifying on every inquisition as to property, lunacy, or otherwise	1	1	0
Notifying and executing (including drawing, if required) every writ of transfer	1	1	0
It is hereby open after hours	1	1	0
From 1st December, 1906, relative to the opening of the Court between 10 a.m. and 3.30 p.m. on Court days which are not public holidays	0	5	0

OFFICERS' FEES.		£	s.	d.
Executing any warrant on ca. sa., or ca. re., or ha. fa., or attachment in insolvency, or otherwise		1	1	0
Ditto on fi. fa., when the amount to be levied under the warrant does not exceed £50		0	10	6
For every additional sum of £50; or part thereof, up to £200		0	10	6
Service of process or document, each person		0	5	0
Mileage necessarily travelled for the purpose of serving any process or document, or for the purpose of executing any warrant or other process each time—not exceeding per mile		0	1	0
Ditto where more than one process or document is to be served or executed at same time on same person, or on different persons in same locality, each process 6d., each time per mile		0	0	6
Keepers' fee, each man per diem		0	10	0
Assistance required to execute a warrant of ejection, each assistant per diem		0	10	0
Travelling expenses for each keeper or assistant—actual expenses—not exceeding per mile		0	1	0
Mileage in conveying party to gaol, each man per mile not exceeding		0	1	0
Accepting bail bond under £200 (to be paid by defendant)..		1	0	0
Above that sum, for every £100 or part thereof (to be paid by defendant), not exceeding a maximum fee of £3..		0	10	0
For every sale where amount received does not exceed £100..		1	0	0
For every additional £50, or part thereof, up to the amount required to satisfy writ, not exceeding £300 ..		0	10	0
Making inventory and copy in an insolvent estate		0	10	6
Return of non est inventus, if requested		0	5	0
Delivering goods in replevin		1	1	0

EXPENSES AND SUMS.

Advertising	} The amount actually and reasonably incurred.		
Meals for keeper			
Removal of party arrested to gaol			
Live stock levied upon—cost of keep			
Necessary assistance to officer in the execution of any writ			
Necessary fares or other expenses in connection with any view or inquisition.			
Appraiser, where the sum demanded and due in replevin does not exceed £50, for appraisement and affidavit of value ..	1	1	0
Appraiser, where it exceeds £50	1	10	0
Travelling expenses of appraiser, and in cases where the the before-mentioned rates are found insufficient, mileage each way, not exceeding	0	1	0

RULES—5th MARCH, 1912.

Tuesday, the fifth day of March, 1912.

In pursuance of all powers vested in us we do order and direct as follows:—

Where in any civil or commercial matter pending before a Court or tribunal of a foreign country, a letter of request from such Court or tribunal for the service on any person in New South Wales of any process or citation in such matter, accompanied by a translation thereof in the English language, and by two copies of the process or citation to be served together with two copies thereof in the English language, is transmitted to the Supreme Court by the Attorney General, with an intimation that it is desirable that effect should be given to such letter of request, the following procedure shall be adopted :—

(1.) Service of the process or citation shall be effected by the person whom a Judge of the Court may from time to time appoint for the purpose, or by the authorised agent of such person.

(2.) Such service shall be effected by delivering to the person to be served one copy of the process or citation, and one copy of the translation thereof, or in such other manner as may be directed by a Judge if he is satisfied that personal service cannot be effected.

(3.) After service has been effected, the process server shall return to the Prothonotary the other copies of the process or citation and the translation thereof, together with an affidavit of service and particulars of his charges for effecting same.

(4.) The authority of the person before whom such affidavit is sworn, to administer an oath, and his signature, shall be verified by a certificate of a Notary Public or of the Prothonotary.

(5.) The Prothonotary shall give a certificate of the amount which is properly payable for the cost of so effecting service.

(6.) The Prothonotary shall transmit to the Attorney General the letter of request for service, the process or citation, of which service has been effected, and the translations thereof, together with the affidavit and certificates hereinbefore mentioned, and also a certificate under the seal of the Court in the form given in the Schedule hereto, with such variations as circumstances may require.

(7.) Upon the application of the Crown Solicitor, the Court or a Judge may make all such orders for substituted service or otherwise as may be necessary to give effect to these rules.

(8.) The duties of the Prothonotary under these rules may, in his absence, or during his indisposition, or at his request, be performed by the Chief Clerk of the Supreme Court.

SCHEDULE.

I, ..., Prothonotary of the Supreme Court of New South Wales, hereby certify that the documents annexed hereto are as follows :—

(1.) The original letter of request for service of process received from the Court or Tribunal at.....in the.....of in the matter of.....*versus* and the translation thereof ; and

(2.) The process received with such letter of request and the translation thereof ; and

(3.) The affidavit of service upon.....the person to be served with such process, duly verified.

And I further certify that such service so proved and the proof thereof are

such as are required by the law and practice of the Supreme Court of New South Wales. And I further certify that the sum which is properly payable for so effecting service amounts to £ : :

Dated this.....day of.....19 .

(L.S.)

Prothonotary.

W. P. CULLEN, C.J.

ROBERT D. PRING, J.

DAVID G. FERGUSON, A.J.

RULES—12th AUGUST, 1912.

Monday, the twelfth day of August, 1912.

In pursuance of all powers vested in us we do order and direct as follows :—

1. The Prothonotary is hereby empowered to do all such things and transact all such business and exercise all such authority and jurisdiction in respect of the same as by virtue of any Statute or custom or by the rules and practice of the Court in its Common Law Jurisdiction are now done, transacted, or exercised by a Judge in Chambers, except in respect of the following proceedings and matters, that is to say :—

1. Matters relating to the liberty of the subject.
2. Matters relating to Criminal proceedings.
3. The removal of Causes from Inferior Courts.
4. Applications for change of Venue.
5. Applications in respect of pleadings.
6. Applications for Certificates for Costs.
7. Prohibitions, Injunctions and Mandamus.
8. The referring of Causes to Arbitration.
9. Special cases under any Statute.
10. Interpleader, other than matters relating to practice only.
11. Discovery or inspection.
12. Reviewing taxation of costs.
13. Staying proceedings after verdict.
14. Applications under the Real Property Act, 1900.
15. Foreign Attachment.

Provided that consent orders may be made in any case by the Prothonotary, excepting in respect of matters relating to the liberty of the subject or to Criminal proceedings.

These Rules, dealing with the duties of the Prothonotary, have been made in pursuance of s. 9 of the Supreme Court and Circuit Courts (Amendment) Act, 1912, *ante*, p. 52.

2. The Prothonotary may refer any matter, which in his opinion should be so referred, to a Judge, who may dispose of the matter or give directions thereon.

3. Upon production of a certificate by the Prothonotary that he had refused to make an order in an *ex parte* matter, application may be made to a Judge for such order.

4. If either party is dissatisfied with the decision of the Prothonotary in any other matter, he may, within two days from such decision, or within such further time as may be allowed by a Judge, file a request that the matter be referred to the Judge sitting in Chambers, and shall, within the same time, serve a notice of such request having been filed.

5. The matter shall thereupon be placed in the list of matters for hearing on the then next day on which a Judge shall sit for Chamber work.

6. A reference shall not operate as a stay of proceedings unless a Judge or the Prothonotary otherwise orders.

7. The costs of such reference shall be in the discretion of the Judge.

8. The scales of costs for business transacted before the Prothonotary shall be the same as are fixed for business transacted before the Judges.

9. In any case in which the Prothonotary is of opinion that the attendance of Counsel before him is unnecessary, he may give a certificate to that effect, and the taxing officer may act upon such certificate.

10. The Court fees to be taken in respect of business transacted under these rules before the Prothonotary shall be the same as those which are now taken in respect of the same business when transacted before a Judge.

11. The duties and powers of the Prothonotary under these rules may, in his absence or during his indisposition or at his request, be performed and exercised by the Deputy Prothonotary.

12. The gaoler at each gaol shall forward to the Prothonotary at the Supreme Court, Sydney, seven days before the days appointed for the regular sittings of the said Court in its Criminal Jurisdiction at Darlinghurst each year, a return in writing of all the persons detained in such gaol, otherwise than in pursuance of a sentence.

See Supreme Court and Circuit Courts (Amendment) Act, 1912, s. 8, *ante*, p. 54.

13. Such return shall be in the form in the Schedule hereto and shall be certified by the gaoler who transmits it.

14. Every such return shall be handed by the Prothonotary to the Associate of the Judge presiding at the sittings of the Central Criminal Court next ensuing, after such return has been forwarded. The Prothonotary shall also hand to such Associate a list of the gaolers, if any, who have failed to forward the prescribed return.

W. P. CULLEN, C.J.

ROBERT D. PRING, J.

DAVID G. FERGUSON, J.

RULES—6th DECEMBER, 1912.

**In the Supreme Court
of New South Wales**

Friday, the sixth day of December, 1912.

It is hereby ordered that Cootamundra and Narrabri be added to the list of towns comprised in the Schedule to the Rules of the 15th December, 1904, at which Writs of Summons or Writs of Subpoena may be issued.

**ROBERT D. PRING, J.
ALEXANDER GORDON, J.
DAVID G. FERGUSON, J.**

RULES—10th DECEMBER, 1912.

**In the Supreme Court
of New South Wales**

Tuesday, the tenth day of December, 1912.

It is hereby ordered that Rules 106, 436, 437, 470 and 471 be repealed, and the following Rules substituted in their place :—

106. For each day of the Sittings there shall be separate Cause Lists which shall be taken in the respective Jury Courts.

436. Before such introduction such person shall produce to the Secretary—

- (a) A certificate of his having passed in the University of Sydney the preliminary examination for intending articled clerks ; or
- (b) A certificate from the Registrar of the University of Sydney of his having passed in the University of Sydney, or some other University recognised by it, an examination entitling him to be admitted as a student in the Faculty of Arts or the Faculty of Law ; or
- (c) A certificate from the said Registrar of his having passed an examination equivalent to one of those mentioned in Clauses (a) and (b) hereof ; or
- (d) A certificate from the said Registrar of his having matriculated and attended the University course of lectures for one whole academic year ; or
- (e) A certificate of his having passed in England, Scotland, or Ireland, the preliminary examinations which Articled Clerks are there required to pass ; or
- (f) The testamur of his degree or other satisfactory evidence of his being a graduate within the meaning of Rule 427.

437. At the time of such introduction the intended master or his agent shall produce to the Judge satisfactory certificates of the character of such person and of his fitness to be admitted to articles,

the intended articles unexecuted, and a certificate by the Secretary of compliance with the last preceding Rule indorsed upon such articles.

470. Every person desirous of presenting himself for the preliminary examination for intending Articled Clerks under clause (a) of Rule 436 shall give notice thereof to the Secretary and pay to him a fee of five pounds not less than sixteen days before the day appointed for such examination.

471. Every person desiring to obtain a certificate under Clauses (b) or (c) of Rule 436 for the purpose of being admitted to articles shall give notice to the Secretary and pay to him a fee of five pounds.

ROBERT D. PRING, J.

P. W. STREET, J.

R. M. SLY, J.

ALEXANDER GORDON, J.

DAVID G. FERGUSON, J.

NOTES OF CASES

On Points of Practice in the Common Law Jurisdiction of the Supreme Court of New South Wales, decided since the publication of Rolin and Innes' Supreme Court Practice; arranged as notes to that book. The reference "S.C.P. p. 15" is to the page in Rolin and Innes' Supreme Court Practice.

S.C.P., p. 15.

C.L.P. Act, s. 16—Writ of summons—Service on foreign company carrying on business here.—A foreign company may carry on business here through agents in such a way as to be resident here, and service of a writ of summons on the agents may be good service; whether, when a limited company are the agents, service on that company is good service on the principal, *quaere*: *Spicer and Others v. The International Paper Co.*, (1904), 21 W.N. 136.

Service of a writ on agents within the jurisdiction set aside, the Court holding on the facts that the foreign company had not a business domicile in the State: *Denham v. Armour*, (1905), 22 W.N. 142.

An American steamship company represented here by an agent, *held*, not to be resident in this State for the purpose of being sued here: *Williams v. United States and A. S.S. Co.*, (1909), 25 W.N. 43.

S.C.P., pp. 16, 18.

C.L.P. Act, s. 17—Service of writ of summons—Affidavit—Irregularity—Delay.—The affidavit of service stated that the writ had been served by "leaving it with Colin Fisher at the last known residence of the defendant." On application to set aside judgment signed in default of appearance, *held*, that the affidavit was irregular; but as the application was four months after service of writ, judgment was set aside on terms only: *Crawford v. Fisher*, (1907), 24 W.N. 102.

C.L.P. Act, s. 17—Service of writ—Leaving with clerk at office.—Judgment for want of appearance was set aside, with costs, when the writ had been served on a clerk in the defendant's office; although there was no affidavit of merits, or that the writ had not come to defendant's knowledge: *Edgley v. Rankin*, (1904), 21 W.N. 143.

S.C.P., p. 24.

C.L.P. Act, s. 24—Special endorsement—Interest.—Where a claim for interest was included in the special endorsement, the Court refused to assume, in the absence of evidence to that effect, that interest was not in fact recoverable, and held the writ good: *Brooks & Co. v. Smith*, (1903), 20 W.N. 77.

Special endorsement—Cash advanced.—Where a writ was specially endorsed "to amount of cash advanced by plaintiff to defendant," *held*, that this did not necessarily mean "money lent," but a claim for "money received" could be proved: *Daley v. Knowles*, (1905), 5 S.R. (N.S.W.) 611; 22 W.N. 194.

S.C.P., p. 43.

C.L.P. Act, s. 61—False plea—Striking out.—Pleas not being admittedly false could not be struck out: *Hilder v. Mulcahy*, 1 W.N. 70, explained: *Rand v. McLean*, (1903), 20 W.N. 181.

After *Hilder v. Mulcahy*, 1 W.N. 70, add, see *Reid v. Taylor*, 10 W.N. 123.

S.C.P., p. 45.

C.L.P. Act, s. 69—Declaration within a year.—After service of writ proceedings were stayed for several years at defendant's request. Plaintiff then gave defendant notice that he intended to proceed, and sign judgment for want of appearance; defendant entered an appearance, and plaintiff filed a declaration. *Pring, J.*, set aside the declaration: *Parish v. Brown*, (1904), 21 W.N. 21.

S.C.P., p. 51.

C.L.P. Act, s. 79—Cross action—Principal and agent.—In an action by an undisclosed principal on a contract made by his agent, the defendant cannot plead a cross-action claiming damages for breach of the contract by the agent: *Stevenson v. Carpenter*, (1904), 4 S.R. (N.S.W.) 129; 21 W.N. 42.

Pleas of breach of warranty and fraud.—To an action on a promissory note given in part payment for a share of a business, the defendant pleaded two pleas of cross-action; (1) for breach of warranty; (2) for fraudulent representation. On summons for leave to plead these pleas leave was refused: *Simpson v. Kemp*, (1907), 24 W.N. 176.

Arising out of the same subject matter.—A plea of cross-action was allowed where the matter pleaded related to the same subject matter as the cause of action declared on, although it did not arise out of the same contract: *Assets & General Finance Co. v. Crick*, (1911), 28 W.N. 91.

S.C.P., p. 55.

C.L.P. Act, s. 83—Costs after acceptance of money paid into Court—Costs of a commission.—Plaintiff accepted a sum paid into Court, and discontinued the action; costs of a commission to examine defendant's witnesses incurred before plea, made by the order costs in the cause, were allowed to the defendant: *Federal S.N. Co. v. Currie*, (1903), 20 W.N. 217.

S.C.P., p. 58.

C.L.P. Act, s. 90—Pleading several matters—Crown.—In a suit nominally by the Crown, but really between individuals, the Crown waiving its right to object, *Sly, J.*, allowed several matters to be pleaded: *R. v. Miller*, (1908), 25 W.N. 165.

S.C.P., p. 60.

C.L.P. Act, s. 92—Setting aside ex parte order to plead several matters.—An *ex parte* order granting leave to plead several matters may be set aside by a Judge in Chambers: *Garrett v. Hasler*, (1904), 21 W.N. 206.

S.C.P., p. 65.

C.L.P. Act, s. 100—Demurrer—Right to begin.—Defendant having demurred to the replication, plaintiff gave notice of intention to object to the plea. *Held*, that this was not a cross-demurrer, and defendant began: *Clisdell v. Gibney*, (1904), 4 S.R. (N.S.W.) 670; 21 W.N. 237.

S.C.P., pp. 66-71.

C.L.P. Act, s. 102—Discovery—Right to.—A party who brings himself within the requirements of s. 102 of the C.L.P. Act is entitled to a discovery order as a matter of right: *MacIntosh v. Dun*, (1905), 5 S.R. (N.S.W.) 99; 22 W.N. 19.

Discovery—Commonwealth.—An order for discovery cannot be made against the Commonwealth, defendant in an action: *Commonwealth v. Baume*, (1905), 2 C.L.R. 405; reversing 22 W.N. 5.

Discovery—Action for penalty.—Discovery will not be granted in aid of an action for a penalty: *Ballard v. Coles*, (1906), 23 W.N. 80.

Discovery—Libel—Damages.—Defendant in an action for libel who pleads the general issue is not entitled to an order for discovery to enable him to cut down damages: *Co-operative Coupon Co. v. Inglis & Co.*, (1903), 20 W.N. 233.

Discovery—Res judicata—Second application.—Application for discovery, made after the pleadings, was refused on the ground that an application made before declaration had been refused: *MacIntosh and Another v. Dun and Others*, (1904), 21 W.N. 232; reversed on appeal, 5 S.R. (N.S.W.) 99; 22 W.N. 19.

Discovery before declaration—Libel action.—Discovery before declaration refused in a libel action: *MacIntosh v. Dun*, (1904), 21 W.N. 200.

Discovery—Inspection before declaration.—In an action on a policy of life insurance the plaintiff is entitled to the production of the proposal before declaration: *Williams v. Mutual Life Association of Australasia*, (1904), 21 W.N. 99.

Discovery—Affidavit by agent.—The Court cannot order an affidavit of discovery to be made by an agent of the parties sued, or limit the order by ordering the affidavit to be made by some of the plaintiffs instead of by all of them: *Spicer and Others v. The International Paper Co.*, (1904), 21 W.N. 184.

Discovery—Answer on affidavit.—*Sly, J.*, made a discovery order, ordering that the defendant answer on affidavit stating what he knows as to the custody of "certain documents and whether they or any of them have been in his possession or power," and, if so, "stating particulars of the same, and when they were last in his possession or power, and what has become of them, and in whose possession they now are"; *held*, on appeal, that the latter part of the order must be struck out, as beyond the powers of the Court: *Pendlebury v. O'Neill*, (1911), 11 S.R. (N.S.W.) 188; 28 W.N. 59.

S.C.P., pp. 75, 76.

C.L.P. Act, s. 108—Change of venue—Powers of Judge—RR. 116, 117.—Rules 116, 117, giving power to a Judge in Chambers to order a change of venue, are not *ultra vires*: *Wills v. Garrett*, (1905), 22 W.N. 59.

Change of venue—Agreement between parties.—An agreement between the parties that the plaintiff in the event of defendant's default might sue in Sydney, *held*, not to alter the discretion of the Court on an application for change of venue: *Angas v. Tremaine*, (1909), 25 W.N. 43.

Change of venue—Plaintiff's application—Costs of summons.—Plaintiff asked defendant to consent to change of venue from Sydney to Bathurst; defendant refused to consent, but on the summons admitted that Bathurst was more convenient; no order made as to costs; defendant had refused to consent, but plaintiff could have laid the venue at Bathurst originally: *Batty v. Municipal Council of Blayney*, (1912), 29 W.N. 167.

Change of venue—Appeal.—The Court on appeal will be slow to interfere except where the Judge has acted on a wrong principle: *Budge v. Britten*, (1903), 20 W.N. 87.

Change of venue—Evidence.—There is no general rule that in applications for change of venue, the nature of the evidence to be given by applicant's witnesses must be stated: *Australasian Sheep Dip Co. v. Kramer*, (1903), 20 W.N. 234.

Change of venue—Evidence.—In applications for change of venue it is enough to state on affidavit that the witnesses are necessary and material: *Churchill v. Collman*, (1905), 22 W.N. 218.

Change of venue—Fair and unprejudiced trial.—In an action of libel, venue was laid in Sydney; change of venue to Wagga refused, because the defendant, since action brought, had published articles in his newspaper circulating in Wagga tending to prejudice the fair trial of the action: *Napier v. Cowin*, (1911), 28 W.N. 78.

Change of venue—Delay in hearing.—Venue in a country case changed to a circuit court, although the case was thereby delayed for some months: *Mitchell v. Carstairs*, (1904), 21 W.N. 100.

In a slander action, change of venue was refused on the ground that sending the case to the circuit court involved three months' delay: *Wills v. Garrett*, (1905), 22 W.N. 59.

Change of venue—Country cases.—*O'Donoghue v. Oliphant*, 18 W.N.

117; but see *Kiehona v. Sullivan*, (1903), 20 W.N. 34; *Permewan, Wright v. Pearce*, (1903), 20 W.N. 202.

Ejectment—Change of venue—C.L.P. Act, s. 109.—Defendant in ejectment applied for a change of venue before issue filed; *held*, that the application was premature: *Mann v. Wilson*, (1912), 29 W.N. 92.

S.C.P., p. 79.

C.L.P. Act, s. 112—Postponement of trial—Contempt by plaintiff.—Publication by plaintiff, after writ issued, of statements relating to the matters in dispute in a libel action, *held*, not a ground for postponing the trial, even though the statements might be a contempt of Court: *Godhard v. Inglis & Co.*, (1903), 20 W.N. 258.

S.C.P., p. 81.

C.L.P. Act, ss. 117-119—Remitting action to District Court.—These sections are repealed; see now District Courts Act, 1912, ss. 2, 139, &c., *ante*, p. 7.

S.C.P., p. 89.

C.L.P. Act, s. 140.—See the Usury Bills of Lading and Written Memoranda Act, 1902, s. 4, which provides that in all cases where interest for the loan of money or upon any other contract may be recovered in any action or suit, the amount so recovered shall not, where the rate of interest has not been previously agreed upon by the parties, exceed eight per cent. per annum.

S.C.P., p. 89.

C.L.P. Act, s. 140—Interest.—To entitle a plaintiff to recover interest under s. 140 (a) of the Common Law Procedure Act, on a debt payable by virtue of a written instrument, the date of payment must be fixed by the instrument itself: it is not enough that the payment should be contingent on an event which did in fact happen: *Hough v. Whitty*, (1903), 20 W.N. 218.

S.C.P., p. 95.

C.L.P. Act, s. 95—Death of a defendant partner—Survival—Attorney's retainer.—An attorney was retained by one partner to appear and defend an action for the firm; the partner died, suggestion was entered, and the action continued against the other partner, who was out of jurisdiction; *held*, that the attorney's retainer continued: *MacDonald v. Roche*, (1903), 20 W.N. 89.

S.C.P., pp. 101-105.

C.L.P. Act, s. 160—New trial—Verdict for £21.—The Court expressed an opinion that, even if the first trial was abortive, they would not grant a new trial in an action for goods sold, where only £21 was involved and the parties lived in the country: *Killen v. Robinson*, (1907), 24 W.N. 8.

But where the Court thought a verdict for £14 in a claim for goods sold and delivered was demonstrably wrong, a new trial was granted: *Malouf v. John*, (1903), 20 W.N. 73.

New trial—Conversing with jurymen.—Defendant moved for a new trial on the ground that plaintiff, during the trial, was guilty of misconduct in conversing with one of the jurymen; *held*, by the Full Court, that it was impossible to deal with the matter on affidavits, and the rule was discharged: *Henley v. Shoppee*, (1908), 25 W.N. 29.

New trial—Issue not tried.—A Judge, trying a case without a jury, did not determine the issues; new trial granted: *Merewether v. Scottish Australian Mining Co.*, (1906), 23 W.N. 106; *aff.* 4 C.L.R. 953.

New trial—Evidence wrongly admitted.—Where the Court were of opinion that evidence had been wrongly admitted, but that it did not influence the minds of the jury, new trial was refused: *Carbury v. Measures*, (1904), 4 S.R. (N.S.W.) 569; 21 W.N. 169.

Nonsuit on opening.—A Judge cannot nonsuit a plaintiff without his consent on counsel's opening statement without hearing the evidence tendered for plaintiff: *Peal v. Irvine*, (1910), 27 W.N. 121.

Nonsuit after adverse ruling.—A plaintiff accepting a nonsuit after an adverse ruling by the Judge is not precluded from appealing: *Dowling v. Farrell*, (1903), 3 S.R. (N.S.W.) 42.

New trial—Excessive damages.—New trial granted on this ground on question of damages only in a slander action: *Daley v. Lundin*, (1908), 8 S.R. (N.S.W.) 447; 25 W.N. 119.

Inadequate damages.—New trial asked for on this ground in a slander action refused: *Webb v. Louis*, (1907), 7 S.R. (N.S.W.) 734; 24 W.N. 194. A new trial will only be granted on this ground in a very clear case: *Houlton v. Liddy*, (1908), 25 W.N. 124.

New trial—Excessive damages.—In an action for dishonour of a cheque and for libel, verdict £800, a new trial was granted on the ground of excessive damages: *Miles v. Commercial Banking Co.*, (1904), 4 S.R. 223; 21 W.N. 84; affirmed in H.C., 1 C.L.R. 470.

Power of Court to reduce damages.—The Court has no right to reduce damages unless both parties consent: *Watt v. Watt* (1905), A.C. 115; *Baume v. Commonwealth*, 4 C.L.R. 97.

New trial—Misdirection.—A new trial will not be granted on the ground of misdirection unless the attention of the Judge at the trial has been called to the alleged misdirection, and opportunity has been given to correct it: *Barker v. Smith*, (1907), 7 S.R. (N.S.W.) 716; 24 W.N. 175, following *Mutual Life Insurance Co. of New York v. Moss*, 4 C.L.R. 311.

But on a question of the right measure of damages, it seems not essential to call the attention of the Judge at the trial: see *Holmes v. Jones*, (1907), 4 C.L.R. at p. 1696.

New trial—Costs of first trial.—The Court has power to order that costs of the first trial should be costs in the cause: *Gorman v. Wills*, 4 C.L.R. 780; and this may now be regarded as the usual course.

S.C.P., p. 111.

C.L.P. Act, s. 180—Attachment of debts—Examination of judgment debtor.—An order for examination of a judgment debtor under s. 180 of the Common Law Procedure Act may be made *ex parte*, without summons: *Crossman v. Paul*, (1904), 21 W.N. 145.

S.C.P., p. 117.

C.L.P. Act, s. 188—Foreign attachment—Company.—Property of the defendant in the hands of an incorporated company may be attached by process of foreign attachment; so held by the Full Court: *Ash v. Wall*, (1911), 11 S.R. (N.S.W.) 54; 28 W.N. 11; overruling *Langer v. Wahrheit*, 21 W.N. 49.

S.C.P., p. 119.

C.L.P. Act, s. 194—Foreign attachment.—In an application by the plaintiff under s. 194 of the Common Law Procedure Act, the Court ordered that money in the hands of the garnishee should be brought into Court to abide the result of the action, and that the plaintiff should pay the garnishee's costs of appearing, to be repaid to the plaintiff out of the money in Court, if he succeeded in the action: *Dalton Brothers of Sydney Ltd. v. Cable*, (1908), 25 W.N. 151.

S.C.P., pp. 129, 133.

C.L.P. Act, ss. 216, 231—Ejectment—Undivided moiety—Affidavit denying ouster.—Defendant appearing in an action of ejectment gave notice that he limited his defence to an undivided moiety of the land, but filed no affidavit denying ouster. *Pring, J.*, refused to set aside the appearance: *Burrows v. Brownell*, (1903), 20 W.N. 126.

S.C.P., p. 133.

C.L.P. Act, s. 228—Ejectment—Time for issuing execution.—"Within" in this section must be read "after," and the Court need not fix a time for execution; if none is fixed, the plaintiff may issue execution after fourteen

days from entering verdict, or after the fifth day in term after the verdict, whichever first happens: *Heydon v. Lillis*, (1907), 4 C.L.R. 1261.

S.C.P., p. 139.

Stay—Vexatious action—Ca. re.—A Judge has inherent power to stay the proceedings in an action which must certainly fail, and is therefore vexatious. In an action on a bond alleging that the defendant had agreed to put in special bail, but had not done so, special bail had been put in, but no "rule of allowance" obtained; *held*, that the practice here was controlled by the rules of Court, and no "rule of allowance was necessary": *Gregory v. Comerford*, (1909), 26 W.N. 42.

Stay of proceedings—Vexatious action.—The Court has jurisdiction to stay proceedings in an action which cannot possibly succeed: *McLaughlin v. Fosbery*, (1904), 1 C.L.R. 546.

Stay of proceedings—Vexatious action.—A vexatious and frivolous action may be stayed: *McLaughlin v. Westgarth*, (1904), 4 S.R. (N.S.W.) 660; 21 W.N. 225; in P.C., 6 S.R. (N.S.W.) 664.

Stay—No cause of action.—An action for slander alleged to have been uttered by a servant of the defendants, was stayed, there being no evidence that the slander was uttered by the servant in the course of his employment, or for the defendants: *Avery v. The Sydney Harbour Trust Commissioners*, (1905), 22 W.N. 54.

Stay—Frivolous and vexatious action.—Application to stay an action as "frivolous and vexatious" refused; the action was one of assault, brought by a solicitor against the chairman of a Licensing Court; *Gannon v. Smithers*, (1907), 24 W.N. 36.

Stay of action—Res judicata.—Plaintiff sued in the District Court for fraudulent misrepresentation; the same claim had previously been made in defence to an action by the present defendants; *Scholes, D.C.J.*, stayed the present action as vexatious: *Harrigan v. Walker*, (1910), 27 W.N. 50.

Stay of proceedings pending decision in another matter.—Stay of proceedings in an action of trespass granted till the hearing of an appeal to the Full Court from the order of a Judge setting aside a writ of *ca. sa.*, where the fact that the *ca. sa.* was rightly issued would be a defence to the action: *Ferris v. Lambton and Another*, (1905), 22 W.N. 56.

Stay after trial for purposes of appeal.—Stay of proceedings granted after trial to permit an appeal to the High Court: *Green v. Green*, (1903), 20 W.N. 279.

Stay of proceedings—Two actions—High Court and Supreme Court.—Plaintiff sued in the High Court for arrears of money due on a deed up to June; and afterwards brought another action in the Supreme Court for money due after June; *held*, that the second action was not vexatious; *Price v. Price*, (1910), 27 W.N. 114.

Stay of proceedings on High Court judgment.—The Court has no power to stay proceedings on a judgment of the High Court, pending an appeal to the Privy Council: *MacIntosh v. Dun*, (1906), 6 S.R. (N.S.W.) 451; 23 W.N. 152.

Stay of proceedings—District Court appeal.—The Supreme Court has jurisdiction to stay proceedings on a judgment of the District Court, when an appeal from that judgment is pending: *Smedley v. The Council of the Municipality of Ashfield*, (1911), 28 W.N. 46.

S.C.P., p. 148.

C.L.P. Act, s. 256—Production of documents.—An order for the production of depositions under s. 256 of the C.L.P. Act must be made at the hearing of the matter; application made to the Court before the hearing refused: *Ex parte Umpelby*, (1906), 23 W.N. 54.

S.C.P., p. 150.

C.L.P. Act, s. 259—Amendment—Indorsement "In Chambers."—Amendment will be allowed where papers are not indorsed "In Chambers": *Ex parte Johnson*, (1908), 25 W.N. 9; *Dose & Co. v. Burke*, (1906), 23 W.N.

2; *Ex parte Barnett*, (1907), 7 S.R. (N.S.W.) 788; 24 W.N. 109; although it had been refused, and an application dismissed with costs: *Ex parte Wilton*, (1904), 21 W.N. 205.

Rule made returnable before Judge "in Chambers."—A rule *nisi* for a statutory prohibition was made returnable before a Judge "in Chambers"; on objection taken, amended by striking out the words "in Chambers": *Ex parte Radford*, (1910), 27 W.N. 166; amendment refused: *Ex parte Dawson*, (1903), 20 W.N. 206.

Words "writ of" added to rule nisi.—Amendment would be made when the rule *nisi* for a prohibition called on the respondents to show cause why a "prohibition should not issue," omitting the words "writ of": *Ex parte Wark*, (1905), 22 W.N. 10.

Service of amended rule nisi.—A trivial amendment was made in a rule *nisi* for a prohibition after service of the rule; but the rule as amended was not served; on the point being taken at the hearing of the rule absolute, service was allowed of the amended rule *nunc pro tunc*: *Ex parte Barnier*, 4 S.R. (N.S.W.) 124; (1904), 21 W.N. 36.

Clerical error—Rule nisi for new trial.—A memorandum for a rule *nisi* for a new trial omitted to ask for a new trial; the Court allowed an amendment: *Campbell v. Railway Commissioner*, (1903), 20 W.N. 171.

Indorsement of name on rule and affidavits.—When respondent's name was omitted from the indorsement and title on a rule *nisi*, and the affidavits in support, amendment was allowed: *Ex parte Edwards*, (1903), 20 W.N. 229.

Jurat amended.—The jurat of an affidavit omitted to state the place where the affidavit was sworn; amendment allowed: *Ex parte Estlich*, (1905), 5 S.R. (N.S.W.) 470; 22 W.N. 148.

Adding plea of fraud.—Application to add a plea of fraud refused after issue joined, there being no affidavit showing the facts relied upon, or stating the time when they came to defendant's knowledge: *Falk v. Lysaght Bros. & Co.*, (1904), 21 W.N. 38; but see 2 C.L.R. 421.

Amending postea.—See *Huband Smith v. Dowe*, (1906) 23 W.N. 171, noted *post*, S.C.P. p. 157.

Amendment judgment.—See *Glasson v. Barry*, 29 W.N. 123; noted *post*, S.C.P., p. 157.

S.C.P., p. 153.

Costs—Where jurisdiction of Court wrongly invoked.—Where the jurisdiction of the Court is wrongly invoked the Court has power to make an order for costs against the applicant: *Strachan v. Irmer*, (1910), 27 W.N. 45.

S.C.P., p. 153.

Security for costs—Plaintiff out of jurisdiction.—Security ordered, although the plaintiff had ample personal assets within the jurisdiction: *Baume v. Lockyer*, (1903), 20 W.N. 195.

Security for costs—Plaintiff a bankrupt.—The facts that plaintiff is an uncertificated bankrupt, and that the Official Assignee stated that he intends to claim any moneys recovered, do not entitle defendant to security for costs: *Caraher v. Gillespie*, (1906), 23 W.N. 161.

S.C.P., p. 155.

Costs on several issues—Interlocutory proceedings.—Plaintiff in an action claimed £146; defendant claimed £300 under a plea of cross-action; the arbitrator to whom the action was referred found for the defendant, with £37 damages on his plea of cross-action, and a verdict for the plaintiff for £109. *Held*, that plaintiff was entitled to the general costs of the action, and therefore to the costs of discovery orders taken out by both parties, where the costs had been made costs in the cause; that the arbitrator's fees followed the event, and could not be apportioned; that the defendant's costs of the issue on which he succeeded should be taxed on the highest scale; that defendant was not entitled to the costs of the plea of cross-action which were made costs in the case: *Nixon v. Howes*, (1907), 24 W.N. 156.

S.C.P., p. 157.

Postea—Distributive issues—Amendment.—In an action on contract, claiming £235, an arbitrator found all issues for the plaintiff, and £40 damages; application to amend the *postea* by entering judgment for £195, balance of the amount claimed, was refused: *Huband Smith v. Dowe*, (1906), 23 W.N. 171.

S.C.P., p. 157.

Costs—Taxation.—Costs are taxed in accordance with the *incipitur* of judgment, and not according to the *postea*; judgment therefore amended to correspond with the *postea*. The Court will not give directions in advance as to how a bill should be taxed: *Glasson v. Barry*, (1912), 29 W.N. 123.

S.C.P., p. 157.

Costs on plea of cross action—Amendment of postea.—In an action on a p.n. for £75 the only plea was one of cross-action; the jury returned a verdict for the plaintiff for £25; and the *postea* was so entered; the Prothonotary refusing to tax defendant's costs on the plea, the Court was moved to amend the *postea*; amendment refused: *Dwyer v. Smith*, (1908), 25 W.N. 12.

S.C.P., p. 157.

Costs on several issues—Verdict for defendant on cross-action.—Plaintiff obtained a verdict for £40 on a claim for £150, and defendant a verdict for £43 14s. on his plea of cross-action. *Held*, on review of taxation, that the defendant was entitled to the general costs of the action on the highest scale; and the plaintiff to the costs of the issues on which he had succeeded, but on the lowest scale: *Glasson v. Barry*, (1912), 29 W.N. 197.

S.C.P., p. 157.

Set-off of costs—R. 425.—G. sued C., and ultimately on appeal to the High Court judgment of nonsuit was entered, with costs of the appeal. C. then sued G. for the costs of the appeal, £268 11s. 8d., but filed a *nolle prosequi*, and G. had judgment for costs, £72; *held*, that set-off of the costs in the actions, to the prejudice of the solicitor's lien, would not be allowed: *Crowley v. Glissan*, (1909), 26 W.N. 131.

S.C.P., p. 158.

Costs—Scales—Over £100.—In an action claiming £268 for debt, defendant paid £162 into Court; and pleaded never indebted as to the balance; plaintiff got a verdict for £39, which was on motion set aside with costs; *held*, that the costs of the motion must be taxed on the highest scale as over £100 was involved in the litigation: *Sydney Harbour Trust v. Warburton*, (1906), 23 W.N. 53.

S.C.P., p. 158.

Costs—Scales—RR. 408, 420—Special case.—A case stated under s. 18 of the Stamp Duties Act, 1898, is not an action at law, and the scale of costs established under R. 408 do not apply: *Robertson v. Commissioner of Stamp Duties*, (1905), 5 S.R. (N.S.W.) 622; 22 W.N. 200. So *held* by the Full Court; but (by the High Court, reversing the decision of the Full Court), an appeal under the Stamp Duties Act comes under the words of R. 420, "all actions and other proceedings," and the scales apply, 3 C.L.R. 829.

S.C.P., p. 158.

Costs—Feigned issue—Preparing for trial.—A feigned issue was directed, to be tried on a date to be fixed; but it was agreed that one party might inform the other that he was satisfied on the question raised by the issue, and that the trial would then be dispensed with. The party was so informed on the 15th June; *held*, that he was not entitled to costs of preparing for trial incurred before that date: *Ex parte Keegan*, (1907), 24 W.N. 181.

S.C.P., p. 160.

Costs—Senior counsel—Discretion of taxing officer.—The question of the allowance of senior counsel is a matter for the discretion of the taxing

officer: *Ex parte Dowling* (No. 2), (1904), 21 W.N. 52; affirmed on appeal, 21 W.N. 89.

Costs—Third counsel—Solicitor and Client Bill.—In taxing a solicitor and client bill of costs, costs of a third counsel, disallowed on party and party taxation, will not be allowed unless the client has been informed by the solicitor, before the costs were incurred, that these costs might not be allowed between party and party; even though the client, after verdict, authorised the payment: *In re Abigail*, (1904), 21 W.N. 16.

Costs—Third counsel—On appeal to High Court.—Question when costs of a third counsel will be allowed discussed: *Donohoe v. Britz* (No. 2), 1 C.L.R. 662.

Costs—Second counsel.—Costs of one counsel only allowed on a summons to increase security for costs of appeal: *McLaughlin v. Daily Telegraph Newspaper Co.* (No. 1), 1 C.L.R. 143.

S.C.P., p. 160.

Costs—Refreshers—Counsel absent.—Refreshers paid to counsel after verdict allowed in taxation, though counsel was away from town during the trial: *N.S.W. Shale and Oil Co. v. Australian Kerosene Oil Co.*, (1904), 21 W.N. 34; *Clines v. Cooper*, 18 W.N. 184, dissented from.

S.C.P., p. 160.

Costs—Two cases against the same defendant.—Two actions were brought against one defendant by different plaintiffs, employing the same solicitor and counsel, and the actions were, by consent, heard together; *held*, that counsel was entitled to a refresher in each case as though the cases had been tried separately, and that the solicitor was entitled for his attendance according to the item, £1 1s. to £5 5s. per day, at the taxing officer's discretion: *Carter v. Newcastle Wallsend Coal Co.*, (1909), 9 S.R. (N.S.W.) 474; 26 W.N. 109; F. C.; overruling 26 W.N. 85.

S.C.P., p. 161.

Certificate for costs—Detinue—Waiver.—Plaintiff in an action of detinue obtained a verdict for £31 19s., including £27, the value of the goods, and judgment was signed for that amount. Defendant then returned the goods. Plaintiff taxed his costs without getting a certificate, and defendant attended the taxation. Afterwards defendant moved to set aside the judgment; *held*, that defendant by attending the taxation, and allowing a fortnight to elapse after taxation before moving, had waived any right to object: *Egan v. Pigott*, (1904), 21 W.N. 251; *Miller v. Hall*, 8 N.S.W.L.R. 469, doubted.

S.C.P., p. 161.

Costs—Certificate—Special endorsement.—Action on a specially endorsed writ to recover £10 15s.; verdict for £8 11s.; a certificate for costs was refused, although it was argued that plaintiff was entitled to come in the Supreme Court, to compel defendant to verify his plea: *Parsons v. Coleman*, (1904), 21 W.N. 122.

S.C.P., p. 161.

Claim under £10—Special endorsement—Certificate.—Defendant, sued for a sum less than £10, for goods sold and delivered, paid the amount after issue, but before service of writ; an application by him for a stay of proceedings was refused, on the ground that the practice is to grant a certificate for costs where the writ is specially endorsed, even though the amount could have been recovered in the Petty Debts Court: *Rosman v. Kenna*, (1904), 21 W.N. 258.

But see now notification by the Judges, *ante*, p. 63.

Certificate for costs—C.L.P. Act, s. 267.—Husband and wife sued jointly for injury to the wife, a count by the husband for loss of *consortium* being added; verdict passed for £25 for the wife and £7 7s. for the husband; on summons for review of taxation, *held*, that though the plaintiffs had sued improperly together, it was too late to take the objection on taxation; judgment was properly signed for £32 7s., and no certificate for costs was necessary: *Buller and Wife v. Musgrove*, (1912), 29 W.N. 22.

S.C.P., p. 177.

Arbitration Act, s. 7—Notice.—Notice must be personal, and served on some one in the State: *In re Max Rown*, (1903), 20 W.N. 77.

S.C.P., p. 181.

Arbitration Act, ss. 15, 16—New trial.—A Judge, in referring a case to an arbitrator, gave certain directions on the pleadings. An award was made, and verdict entered. *Held*, that as no objection was taken to the Judge's directions until after verdict was entered, it was then too late to ask for a new trial on the ground that the directions were wrong: *Munro v. Murray*, (1905), 22 W.N. 113; leave to appeal to High Court rescinded, 3 C.L.R. 788.

S.C.P., p. 187.

Arrest on Mesne Process Act—Writ—Trivial irregularities.—In future writs of *ca. re.* will not be set aside for trivial irregularities in the writ or process connected therewith unless it can be shown that the defendant has actually been misled or prejudiced thereby: *Alexander v. Balloni*, (1905), 5 S.R. (N.S.W.) 603; 22 W.N. 210.

A mistake in the jurat of an affidavit amended: *Vacuum Oil Co. v. Cole*, (1903), 20 W.N. 35.

S.C.P., p. 187.

Arrest on Mesne Process Act, s. 5—Amount of bail.—The writ of *ca. re.* issued to hold the defendant to bail for £50 more than the amount claimed in the writ of summons; *ca. re.* set aside: *Fenwick v. England*, (1903), 20 W.N. 202.

S.C.P., p. 187.

Arrest on Mesne Process Act, s. 5—Amount of bail.—Where defendant had been arrested and held to bail for an amount exceeding the amount of his debt, the writ was set aside, and the Judge refused to impose a term that no action should be brought: *Briscoe & Co. v. Hurrell*, (1907), 24 W.N. 101.

S.C.P., p. 188

Arrest on Mesne Process Act, s. 5 (e).—Reasonable time; add: *Eugene v. Lopez*, (1903), 20 W.N. 103.

S.C.P., p. 192.

Arrest on Mesne Process Act, s. 19.—The endorsement on the writ pursuant to s. 19, described an affidavit as that of "John Reid," the deponent's name being "John Christian Reid." *Pring, J.*, set aside the writ on terms that no action should be brought: *Fenwick v. Olsen*, (1903), 20 W.N. 146.

But see *Alexander v. Balloni*, 5 S.R. (N.S.W.) 603; 22 W.N. 210.

S.C.P., p. 197.

Claims against the Government and Crown Suits Act, 1897.—See the Consolidating Act, *ante*, p. 1.

S.C.P., p. 207.

Evidence Act, s. 15—Certificate.—A certificate under s. 82 of the Public Health Act, 1902 No. 30, is admissible under s. 15 of the Evidence Act without proof that it is in the form prescribed in the Public Health Act: *Ex parte Rigby*, (1905), 22 W.N. 60.

S.C.P., p. 208.

Evidence Act—Certificate, ss. 16, 23.—The certificate did not state that the certifying officer was the officer "ordinarily" having the custody of the records; *held* inadmissible by the Full Court: *Ex parte Brown*, (1905), 5 S.R. (N.S.W.) 691; 22 W.N. 148; but by the High Court admissible, under either s. 23 or s. 16 of the Evidence Act, 3 C.L.R. 373.

S.C.P.:—Rolin and Innes' Supreme Court Practice.

S.C.P., p. 210.

Evidence Act, ss. 15, 21—Judicial proceeding.—A copy of a certificate of registration of a foreign company purporting to be sealed with the seal of a foreign Court and certified by a Judge to be a true copy of the original register, *held*, admissible as a judicial proceeding under the Evidence Act, ss. 15, 21, without proof of the seal of the foreign Court: *Bowden Bros. v. Imperial Marine and Transport Co.*, (1905), 5 S.R. (N.S.W.) 614; 22 W.N. 195.

S.C.P., p. 211.

Evidence Act, s. 23—Certificate.—A certificate of conviction under s. 23 of the Evidence Act need not be verified by affidavit: *Ex parte Crampton*, (1906), 6 S.R. (N.S.W.) 236; 23 W.N. 86.

Evidence Act, s. 23—Certificate.—The certificate did not state the place where the proceedings were held; *held* inadmissible: *Ex parte Eslick*, (1905), 5 S.R. (N.S.W.) 470; 22 W.N. 148.

Evidence Act, s. 23—Certificate.—To make a certificate evidence of proceedings before a magistrate, the requirements of s. 23 of the Evidence Act must be strictly complied with: *Ex parte Carroll*, (1905), 22 W.N. 55.

Evidence Act, s. 23—Certificate.—A certificate purporting to be signed by the "acting C.P.S.," and stating that "the pages following were true copies of the depositions in the summons case, No. 63," *held*, a sufficient certificate under the Evidence Act, s. 23 (f): *Ex parte Ridge*, (1906), 23 W.N. 228.

S.C.P., p. 219.

Evidence Act, s. 53—Party's own witness hostile.—The discretion of the Judge to allow a witness to be treated as hostile is absolute, and the Full Court cannot review the decision: *Harris v. Minister for Public Works*, (1912), 29 W.N. 33.

S.C.P., p. 221.

Evidence of prior inconsistent statements.—A witness called in reply was cross-examined as to prior statements made by him; *held*, by the High Court (overruling the Full Court, 7 S.R. (N.S.W.) 17; 24 W.N. 17), that evidence in contradiction might be called in rejoinder: *Holmes v. Jones*, 4 C.L.R. 1692.

S.C.P., p. 226.

Forfeiture of Leases Act, 1901.—See amending Act, *ante*, p. 13.

S.C.P., p. 230.

General Legal Procedure Act.—Section 4 of this Act is repealed; see Legal Process Facilitation Act, 1904, *ante*, p. 41; and Rules of 15th December, 1904, *ante*, p. 59.

S.C.P., p. 236.

Interpleader Act—Affidavit of claimant.—The claimant is not estopped by his affidavit from giving evidence of purchase of the disputed goods on a date other than that mentioned in the affidavit: *Quigley v. King*, (1904), 21 W.N. 79.

S.C.P., p. 239.

Interpleader—Judgment creditor withdrawing—Costs.—Judgment creditor was ordered to pay claimant's costs in interpleader, although he had withdrawn after the issue of the summons: *Barlow v. Lambert*, (1905), 22 W.N. 6.

Interpleader—Claimant, costs against.—Claimant failing to comply with the interpleader order, ordered to pay costs and sheriff's charges arising in consequence of the claim: *Armstrong & Co. v. Tobin*, (1905), 22 W.N. 112.

Interpleader—Costs—Claimant not appearing.—A claimant not appearing on a sheriff's interpleader may be ordered to pay costs: *Kirwan v. Williams* (*Williams*, claimant), (1904), 21 W.N. 253.

Interpleader Act—Abandoning possession.—The sheriff is not entitled to

an interpleader order if he has abandoned possession ; whether he has so abandoned is a question of fact and intention in each case : *McNamara v. O'Meara*, (1909), 26 W.N. 74.

Interpleader Act, s. 8—Sheriff's costs.—The sheriff is not entitled to the costs of an interpleader summons without an order to that effect under s. 8 of the Interpleader Act, but in future an order will be made. Costs of putting a second keeper in possession allowed, in the absence of any evidence of negligence or unreasonableness in the sheriff : *Massey Harris Co. v. Foley*, (1905), 22 W.N. 6.

S.C.P., p. 256.

Jury Act.—See now Jury Act, 1912, *ante*, p. 19.

S.C.P., p. 284.

Judgment Creditors Remedies Act, ss. 10, 13, 27.—The equitable interest of a judgment debtor is bound by writ of *fi. fa.* as soon as the writ is delivered to the sheriff ; it is not necessary that the interest should be sold or a charging order obtained under s. 10 or s. 27 : *In re Cox*, (1903), 20 W.N. 111.

S.C.P., p. 282.

Attachment—Nonpayment of costs under order of Court.—A writ of attachment will issue as a matter of course for non-payment of costs ordered to be paid : *Daley v. Lundin*, (1909), 9 S.R. (N.S.W.) 127 ; 26 W.N. 12.

S.C.P., p. 283.

Execution—Fi. fa.—Withdrawal—Second writ.—Under direction from the judgment creditor, the bailiff (in a small debts case) having entered under a *fi. fa.*, withdrew and made no return to the writ. *Held*, that the judgment creditor could not issue a second writ : *Thomas v. Kimber*, (1912), 29 W.N. 187.

S.C.P., p. 289.

Judgment Creditors Remedies Act, s. 25—Defamation Act, s. 24.—Bankruptcy of defendant in libel action.—A plaintiff in a libel action obtained a verdict against the defendant, made him bankrupt, and proved in the bankruptcy ; *held*, that he could not, while the bankruptcy was still pending, issue *ca. sa.* against the defendant : *Ferris v. Martin*, (1905), 2 C.L.R. 525 ; on appeal from 22 W.N. 90.

S.C.P., p. 297.

Legal Practitioners Act, s. 12—Victorian barrister.—A member of the Victorian Bar is entitled to be admitted to the Bar of New South Wales : *Re Irvine*, (1909), 26 W.N. 152.

Solicitor—Barrister and Legal Practitioners Act, ss. 11, 14.—Notice of an application by a barrister to be enrolled as a solicitor, or by a solicitor to be admitted to the Bar, must be given to the Incorporated Law Institute and to the secretary of the Bar Council : *Ex parte Wegg Horne*, (1909), 26 W.N. 58. See now Rule of 2nd December, 1909, *ante*, p. 88.

S.C.P., p. 297.

Legal Practitioners Act, s. 15—Right of audience.—Only the attorney on the record has the right to be heard : 26 W.N. 11, 79, 119, 132.

S.C.P., p. 299.

Solicitor and client—Special agreement as to costs.—Solicitor for plaintiff in a District Court action agreed with the plaintiff that if the case went into Court, and defendant paid the costs, plaintiff should not have to pay anything more. The case was settled, £21 being paid by defendant for costs. On plaintiff's application an order was made for delivery and taxation of the solicitor's bill ; *held*, on summons to review, that the bill should be taxed as between attorney and client, though the solicitor could not recover more than £21 : *In re Tanner*, (1912), 29 W.N. 100.

S.C.P., p. 299.

Legal Practitioners Act, s. 21—Delivery of bill before action.—The bill, if sent by post, must be sent in such time as to reach the party in the ordinary course of post, a month before action: *Browne v. Black*, (1912), 1 K.B. 316.

S.C.P., p. 299.

Legal Practitioners Act, s. 22—Deputy Registrar—Master.—A bill was taxed by the Deputy Registrar on behalf of the Master in Equity, and the certificate signed by the Master; *held*, that the Master had no power to sign the certificate, and that the certificate was void: *Ex parte McLaughlin*, (1905), 5 S.R. (N.S.W.) 437; 22 W.N. 123.

S.C.P., p. 305.

Legal Practitioners Act, s. 39—Stay.—Stay of proceedings will not be granted after final judgment has been signed in pursuance of an order made under s. 39 of the Legal Practitioners Act, 1898: *In re Freehill*, (1905), 22 W.N. 98.

Legal Practitioners Act, s. 39—Sum due to client.—Where upon taxation money is found due from an attorney to a client, the client is not entitled to enter up judgment upon the allocatur against the attorney; he should apply to the Court for an order directing the client to pay: *Ex parte Lloyd*, (1906), 23 W.N. 167.

Attorney's Bill—Disputed retainer—Taxation.—Taxation of a bill of costs may proceed, notwithstanding that the retainer is disputed; and the question of retainer having been subsequently determined in the attorney's favour, the taxation stands good: *Ex parte McLaughlin*; *Re Freehill*, 8 S.R. (N.S.W.) 158; (1908) 25 W.N. 57.

S.C.P., p. 315.

Oaths Act, s. 13.—A Judge has no power to treat a full grown aboriginal as incompetent to take an oath, without examining him as to his religious belief, or having some evidence before him as to the witness' incompetency: *R. v. Smith*, (1906), 6 S.R. (N.S.W.) 85; 23 W.N. 11.

A declaration, "I promise to tell the truth and nothing but the truth," is not a valid declaration in lieu of an oath under s. 13 of the Oaths Act: *ib.*

S.C.P., p. 315.

Oaths Act, s. 13.—A witness being unintelligible to the Judge by reason of some peculiarity of utterance, the Judge asked the witness' mother to stand near and repeat what the witness said; *held*, that it was not necessary under the circumstances to swear the mother specially to interpret: *R. v. Roberts*, (1907), 24 W.N. 55.

S.C.P., p. 317.

Oaths Act, s. 20.—The administration of an extra-judicial oath is an indictable offence under the Oaths Act, s. 20, without proof of any *mens rea*: *R. v. Martin*, (1904), 21 W.N. 233.

S.C.P., p. 318.

Oaths Act, s. 26—Matter pending.—Matter pending in the Court in s. 26 of the Oaths Act, 1900 No. 20, means a matter which the Court itself is the tribunal to decide. Where an order was made under the Arbitration Act, appointing an arbitrator, and a summons for a commission subsequently taken out, it was *held* that the affidavit in support was wrongly sworn before a J.P.: *Ex parte MacDonald*, (1904), 21 W.N. 14.

Oaths Act, s. 26.—After final judgment, but before execution, the action is a "matter pending" within the meaning of s. 26 of the Oaths Act: *Rook v. Day*, (1907), 24 W.N. 127.

S.C.P., p. 325.

Privy Council.—See also title Privy Council, *ante*, p. 42, for Orders in Council regulating undefended appeals; and appeals from the High Court.

Value—Appealable amount.—See cases on appeal to the High Court: *Amos v. Fraser*, 4 C.L.R. 79; sufficient evidence of value: *Ashton and Parsons Ltd. v. Gould*, 7 C.L.R. 598.

S.C.P., p. 328.

Appeal to Privy Council—Stay of proceedings.—Plaintiff in an action of assault succeeded on a demurrer to the pleas; leave to appeal to the Privy Council was granted, but stay of proceedings refused: *Crick v. Harnett*, (1907), 24 W.N. 89.

Privy Council appeal—Stay.—Stay of proceedings refused pending an appeal to the Privy Council, where a decree had declared a partnership dissolved, and had directed accounts: *Brown v Brown*, (1910), 27 W.N. 7.

S.C.P., p. 332.

Privy Council—Stay of proceedings after special leave granted.—Proceedings were stayed pending appeal, after special leave to appeal had been granted by the Privy Council: *Howarth v. Walker*, (1903), 20 W.N. 91.

S.C.P., p. 333.

Privy Council—Transcript record—Costs.—Leave having been given to appeal to the Privy Council from a decree of the Supreme Court on further consideration, the Court had no power to include in the transcript record material for the purpose of enabling the appellant to challenge on the appeal certain earlier decrees made in the suit by the High Court. Costs of this dispute left to the Privy Council to decide: *McLaughlin v. City Bank*, (1912), 29 W.N. 172.

S.C.P., p. 338.

Sheriff Act, s. 9.—See amended scale of fees now in force, *ante*, p. 94.

The sheriff is entitled to charge fees for putting a second man in possession, where that was a reasonable course: *Massey Harris Ltd. v. Foley*, (1905), 22 W.N. 6.

S.C.P., p. 342.

Supreme Court Procedure Act, ss. 4, 6.—Section 6 made no change in the procedure laid down by s. 27 (2) of the Real Property Act, 1900; issues of fact under the Real Property Act must be tried by a jury, unless the parties consent to dispense with a jury: *Re Stewart*, (1903), 20 W.N. 212.

S.C.P., p. 343.

Supreme Court Procedure Act, s. 7—Nonsuit.—Where the rule *nisi* for a new trial was silent as to a nonsuit, the Court nevertheless entered a nonsuit under the powers conferred by the Supreme Court Procedure Act, s. 7: *Salter v. Clarke*, (1904), 4 S.R. (N.S.W.) 280; 21 W.N. 71.

S.C.P., p. 343.

Supreme Court Procedure Act, s. 7—Jury disagreeing—Entering verdict.—Where a jury at the trial disagreed, and were discharged without giving a verdict, the Court has power on appeal to enter a verdict: *Heydon v. Lillis*, (1907), 4 C.L.R. 1223; reversing *Heydon v. Lillis*, 23 W.N. 132; 6 S.R. (N.S.W.) 677.

The Court may enter a verdict, though the rule asks only for a new trial: *Balmain New Ferry v. Robertson*, 4 C.L.R. 379; and see *National Mutual Life Association v. Kidman*, 3 C.L.R. 160.

S.C.P., p. 347.

Supreme Court and Circuit Court Act, 1900.—See Amending Act, *ante*, p. 52.

- s. 2 (5), amended by s. 6 (3) of Amending Act.
- ss. 6, 7, 8, repealed by Amending Act, s. 2, and amending section substituted.
- s. 9 (1), repealed by Amending Act, s. 3, and amending section substituted.

S.C.P.—Rollin and Innes' Supreme Court Practice.

s. 9 (2), (3), amended by s. 3 of the Amending Act.

s. 13, new section inserted before s. 13, by Amending Act, s. 4.

s. 13 (a), repealed by s. 6 (3) of the Amending Act.

ss. 14, 15 (a), (b), (c), repealed by Amending Act, s. 5.

Part IV., repealed by Amending Act, s. 6, and new provisions made.

S.C.P., pp. 353-359.

Supreme Court and Circuit Court Act, s. 20, and Notes—Appeal from Judge to Judge as Full Court.—A single Judge sitting under the powers conferred by s. 20 has no power to hear an appeal from the order of another Judge: *Grimson v. Freeman and Another*, (1908), 26 W.N. 3.

Form of rule returnable before Judge for Court.—A rule returnable before a Judge sitting under this section should not be drawn up returnable before a Judge "in Chambers": *Ex parte Dawson*, (1903), 20 W.N. 206.

Confirmation of order.—A rule *nisi* for a statutory prohibition stated want of jurisdiction as one ground; *held*, that as this was a ground for a prohibition at Common Law, and the order, granted by a Judge, had not been confirmed, the rule, as far as that ground was concerned, lapsed: *Ex parte Brown*, (1904), 4 S.R. (N.S.W.) 714; 21 W.N. 231.

Confirming order—Enlarging rule.—A rule *nisi* for a prohibition having been discharged by a single Judge, the successful respondent did not get the order confirmed on the first day of term. Applicant afterwards moved the Court to enlarge the rule *nisi*, and afterwards moved to make the rule absolute; *held*, on preliminary objection taken, that the Court had no power to enlarge the rule *nisi*: *Ex parte Taylor*, (1903), 20 W.N. 121.

Confirming order—Service.—The order of confirmation should be taken out and served: *Ex parte Bell*, (1903), 20 W.N. 169.

Appeal from order.—A rule *nisi* for a prohibition was granted by the Full Court returnable before a single Judge in vacation, who discharged the rule. The respondent did not move to confirm the order discharging the rule; *held*, that counsel for the applicant might first move to confirm the order, and then oppose its confirmation by way of appealing against the Judge's order: *Ex parte Power*, (1909), 26 W.N. 159.

Order of Judge—Appeal—Fresh evidence—Costs.—Where the motion to confirm the order was opposed by way of appeal, and the Court confirmed the order, but as fresh evidence was given, costs were refused: *In re Green*, (1903), 3 S.R. (N.S.W.) 456; 20 W.N. 177.

Making Judge's order a rule of Court.—An order of a Judge under s. 73 of the Real Property Act may be made a rule of Court: *In re Palmer, Wiley* (caveator), (1908), 25 W.N. 93.

Judge's discretion—Appeal.—No appeal lies where a Judge has refused leave to proceed under the Employer's Liability Act, s. 6; it is not a matter of procedure: *Ex parte Yates*, (1907), 7 S.R. (N.S.W.) 217; 24 W.N. 32.

Judge in Chambers—Appeal.—Where jurisdiction is given to the Court or a Judge, and a party applies to a Judge (as, e.g., on an application for discovery under s. 102 of the C.L.P. Act), *held*, that the matter being one of practice or procedure, an appeal lies to the Court: *MacIntosh v. Dun*, (1905), 5 S.R. (N.S.W.) 99; 22 W.N. 19.

Single Judge sitting as Court under special powers—Form of order.—The order of a Judge sitting as the Court under special legislative authority, e.g., s. 107 of the Justices Act, is the order of the Court, and should be drawn up and signed as such; it is not necessary to make such order a rule of Court before issuing execution: *Sawtell v. Berkholtz*, (1907), 24 W.N. 34.

S.C.P., p. 370.

Witnesses Examination Act, s. 4—Commission to examine witness.—On an application by a party for a commission to examine a witness out of the jurisdiction, under s. 4 of the Witnesses Examination Act, 1900, if it is shown to the satisfaction of the Court that the witness is out of the jurisdiction, that his evidence is material, that the Court has no power to enforce his attendance, and that the party applying cannot procure it, the Court is bound

in the exercise of its discretion to order the commission to issue unless the other party can satisfy the Court that the witness can and will attend: *Willis and Another v. Trequair*, (1906), 3 C.L.R. 912; reversing 6 S.R. (N.S.W.) 292; 23 W.N. 81.

A party is almost of course entitled to an order for a commission to examine a material witness who is out of the jurisdiction, and whom the party cannot compel to attend at the trial: *Williams v. The Mutual Life Association of Australasia* (No. 2), (1904), 21 W.N. 177; affirmed on appeal, 21 W.N. 247; 4 S.R. (N.S.W.) 677; and see *Godfrey v. Godfrey* 23 W.N. 217.

Order for commission before pleadings.—Order for commission to examine witnesses abroad, made before pleadings, held good: *Williams v. Australian Mutual Provident Society*, (1904), 21 W.N. 249.

Order made for a commission on behalf of plaintiffs to examine plaintiffs themselves, but only on issues raised by the statement of defence; on any issues raised by the statement of claim, plaintiffs must come here to give evidence: *Matthews v. Funston*, (1906), 23 W.N. 212.

Commission to another State in the Commonwealth.—Application for a commission to examine a witness in West Australia granted, although the attendance of a witness from another State in the Commonwealth can now be compelled: *Richard v. Sutherland*, (1907), 24 W.N. 153.

Affidavit.—On an application to examine a witness on commission abroad, it is not necessary that the affidavits should expressly state that the applicant cannot safely proceed without the evidence: *Ex parte MacDonald*, (1904), 21 W.N. 97.

S.C.P., p. 374.

Witnesses Examination Act, s. 12.—Costs of examination. See *Federal S.N. Co. v. Currie*, 20 W.N. 217.

S.C.P., p. 377.

R. 9—Time running in vacation.—The provisions of R. 9, as to time not running in vacation, do not apply so as to overrule the provisions of s. 105 of the Justices Act, 1902: *Brownrigg v. Smith*, (1908), 25 W.N. 4.

S.C.P., p. 379.

R. 22—Solicitor.—A solicitor who has ceased to practise for fifteen years, and for seven years had been a bookmaker's clerk, was allowed to resume practice: *In re Flett*, (1910), 27 W.N. 109.

R. 26.—Leave given to employ a solicitor who has been struck off the rolls in the office of a solicitor as clerk: *Ex parte Urquhart*, (1906), 23 W.N. 214.

S.C.P., p. 380.

R. 29.—See Legal Process Facilitation Act, *ante*, p. 41.

S.C.P., p. 381.

R. 38—Signature by clerk of another attorney.—A declaration was signed on behalf of the agent of a country attorney, by a clerk to another attorney; held, a nullity: *A. E. Collins Ltd. v. Grey and Another*, (1908), 25 W.N. 4.

R. 33.—"Lismore-Tweed Railway" now reads "Grafton-Tweed Railway." See Rule of 7th July, 1910, *ante*, p. 90.

S.C.P., p. 382.

Particulars—R. 41—Notes.—Further particulars ordered, in action by a land agent for commission: *Willis v. Doble*, (1905), 22 W.N. 33.

S.C.P., p. 383.

Particulars—Action for false representation.—Order for particulars made in an action for false representation: *Keith v. Chipperfield*, (1910), 27 W.N. 11.

S.C.P., p. 386.

R. 60—Leave to plead several matters—Rescission of leave.—A Judge in Chambers has power under R. 302 to rescind an *ex parte* order to plead several matters: *Garrett v. Hasler*, (1904), 21 W.N. 206.

Verifying plea—R. 62.—An unverified plea having been filed, in an action where the writ had been specially endorsed, the attorney filing it was ordered to pay all costs to the plaintiff rendered necessary by putting the plea on the file: *In re a Solicitor*, (1904), 21 W.N. 240.

S.C.P., p. 387.

Plea of never indebted—Ultra vires of company—R. 67.—*Quære*, whether a defence of *ultra vires* in an action by a limited company can be set up under a plea of never indebted, or must be specially pleaded under R. 67: *John Bridge & Co. Ltd. v. McGrath*, (1904), 4 S.R. (N.S.W.) 441; 21 W.N. 159.

Pleading—R. 67—Fraud of agent.—In an action on a contract ostensibly made for his principal by an agent, evidence is admissible under the plea of *non assumpsit* to show that the contract was fraudulently made by the agent for his own benefit to the knowledge of the other party: *Lysaght Bros. & Co. Ltd. v. Falk*, (1905), 2 C.L.R. 421; overruling 4 S.R. (N.S.W.) 665; 21 W.N. 219.

S.C.P., p. 391.

R. 99—Interpleader issue—Defendant's right to set down—Rule 99 applies to interpleader issues: *Corbett v. O'Brien*, (1904), 21 W.N. 176.

S.C.P., p. 392.

R. 106.—This Rule is repealed and a new Rule substituted by Rules of 10th December, 1912, *ante*, p. 100.

S.C.P., p. 393.

RR. 115-117—Change of venue.—See *ante*, p. 104.

S.C.P., p. 394.

R. 126—Jury of twelve.—See *ante*, p. 26.

S.C.P., pp. 397-399.

RR. 150-152—New trial.—These Rules are now repealed; see the Rules of 7th July, 1910, *ante*, p. 91.

The following cases were decided on the old rules now repealed.

RR. 150, 152—Notes ordered and memorandum filed out of time.—Where the Judge's notes were not ordered, nor the memorandum filed till after the time allowed by RR. 150, 152, the rule was refused: *Betts v. Howard*, (1904), 21 W.N. 232.

R. 151—Signature of memorandum by counsel.—The Court will not relax the rule that a memorandum for a rule *nisi* for a new trial must be signed by counsel who was present at the trial: *McLean v. Thompson*, (1903), 20 W.N. 229.

Where counsel appeared at the trial, but his retainer was afterwards withdrawn, R. 151 does not apply and the memorandum for a rule *nisi* need not be signed by counsel: *Dwyer v. Railway Commissioners*, (1907), 5 C.L.R. 686; reversing 24 W.N. 72.

Where counsel who was at the trial was absent from Sydney when the memorandum for a rule *nisi* for a new trial was drawn, the Court allowed the memorandum to be signed by another counsel with whom the counsel at the trial had discussed the matter: *Quigley v. King*, (1904) 4 S.R. (N.S.W.) 204; 21 W.N. 79.

R. 152—Dispensing with Judge's notes.—Where an order is made dispensing with the printing of the Judge's notes, there is no obligation on the party moving to serve a copy of the notes on the other party: *Bode v. Wollongong Gaslight Co. Ltd.*, (1910), 27 W.N. 141.

R. 152—Notes—Evidence on commission.—Evidence taken on commission need not be printed with the Judge's notes: *Howard Smith Ltd. v. Varawa*, (1906), 23 W.N. 182.

Notes—Shorthand notes.—Where shorthand notes of the evidence were taken, and by agreement between the parties were to be taken as Judge's notes, *held*, that it was not sufficient on motion for new trial to print short notes taken by the Judge; new trial motion adjourned: *Chadwick v. The Minister*, (1903), 4 S.R. (N.S.W.) 98; 20 W.N. 250. Afterwards, printing of the shorthand notes was dispensed with: *Ib.*, 21 W.N. 23.

R. 153—Time for moving rule nisi.—In cases heard within eight days of the beginning of term, the motion for rule *nisi* should be made as soon as Judge's notes have been filed and served. The memorandum should not state a date for the hearing: *Quigley v. King*, (1904), 4 S.R. (N.S.W.) 204; 21 W.N. 79.

S.C.P., p. 399.

R. 159—Costs of first trial.—In ordering a new trial the Court has no power to order the costs of the first trial to be costs in the cause: *Wills v. Gorman*, (1906), 23 W.N. 169; but (by the High Court on appeal) there is no doubt the Court has such power: *Gorman v. Wills*, 4 C.L.R. 780.

S.C.P., p. 400.

R. 162—Notes—Right to begin.—See *ante*. p. 103. note to S.C.P., p. 65.

S.C.P., p. 401.

R. 170—Verdict on different counts—Defendant's right to sign judgment.—In an action a verdict for nominal damages was found for the plaintiff on one count, and a verdict for the defendant on other counts; after three weeks, plaintiff not having signed judgment, defendant had leave, on summons, to sign judgment: *Newis v. General Accident Corporation Ltd.*, (1910), 27 W.N. 68.

S.C.P., p. 403.

R. 188.—As to stay of proceedings generally, see *ante*, p. 107.

S.C.P., p. 409.

R. 238—Recognizance of bail—Signature.—Under R. 238 the recognizance of bail should be signed by the bail, but the omission to sign it is an irregularity which might be waived; and the plaintiff having waived it could not sue on the bail bond: *Crawford v. McGrath*, (1908), 25 W.N. 87.

S.C.P., p. 415.

R. 300—Enlarging rule.—A Judge sitting under the powers of the Supreme Court and Circuit Courts Act, 1900, s. 20, discharged a rule *nisi* for a prohibition. The respondent failed to move to confirm the order, but the applicant, to preserve his right to appeal, moved to enlarge the rule *nisi* so that the Court might rehear the application; *held*, that the Court had no power to enlarge the rule: *Ex parte Taylor*, (1903), 20 W.N. 121.

S.C.P., p. 416.

R. 301—Three clear days given—Nullity.—When an *ex parte* order was obtained extending the time for pleading for three clear days, pleas filed on the last of these days, *held*, a nullity: *Leeder v. Geale*, (1904), 21 W.N. 155.

R. 302—Such leave.—See *Garrett v. Hasler*, 21 W.N. 206.

RR. 306, 307—Chamber summons—Grounds.—On a summons in Chambers, the grounds may be sufficiently stated in the affidavit, although not set out specifically: *Leeder v. Geale*, (1904), 21 W.N. 155.

Where the affidavit in support of a summons set out certain facts, but did not expressly state any grounds, the summons was dismissed: *Leeder v. Geale*, 21 W.N. 155, considered: *Mayor, etc., of Kew v. Deerv.*, (1904), 21 W.N. 236.

Summons—Affidavit sworn before issue of summons.—Although no action is pending, a summons may be supported by an affidavit sworn before the issue of the summons: *Ex parte MacDonald* (No. 2), (1904), 21 W.N. 15.

S.C.P., p. 417.

R. 309—Setting aside attachment.—An application to set aside an order for attachment against an infant must be made within a reasonable time. Application in 1907 to set aside an order made in 1905 refused, with costs: *Ex parte Gorman*, (1907), 24 W.N. 123.

R. 309—Notes—Setting aside judgment for want of appearance regularly signed—Defence on the merits.—Defendant explained his non-appearance by saying that he did not know that Sunday counted as a day. His defence was that the action was based on an illegal agreement; *held*, a defence on the merits; judgment set aside on terms: *Rook v. Day*, (1907), 24 W.N. 127.

R. 309—Setting aside judgment—Delay.—Eight or nine days' delay *held* to bar a plaintiff moving to set aside a judgment of *non. pros.*: *Norton v. Beeby*, (1906), 23 W.N. 165.

R. 309—Setting aside declaration—Delay.—An application to set aside declaration on the ground that the name of the plaintiffs differed from the name in the writ, was made after the time for pleading had expired; application refused, as not made within a reasonable time: *Griffiths and Others v. Lamb*, (1904), 21 W.N. 32.

Waiver—Adjournment—R. 309—Notes.—Obtaining an adjournment is not a waiver of an objection that there is no evidence before the Court of the proceedings before the magistrate: *Ex parte Carroll*, (1905), 22 W.N. 55.

R. 310—Service of summons too late.—Where a summons in Chambers was not served before one o'clock on the day preceding the return day, the summons was dismissed with costs: *Hart v. Hart*, (1906), 23 W.N. 41.

S.C.P. p. 418.

R. 312—Abandoning order.—An order made on the application of the defendant to transmit the case to a District Court was not taken out for more than a year; *held*, that the plaintiff was entitled to treat the order as abandoned: *Stacey v. Donaldson*, (1908), 8 S.R. (N.S.W.) 630; 25 W.N. 181.

S.C.P., p. 419.

R. 322—Using papers filed—Judgment.—Summons to set aside a judgment was dismissed on the ground that the affidavit in support of the summons did not state that judgment had been signed: *Weber, Lohmann & Co. v. Turner*, (1905), 22 W.N. 52.

S.C.P., p. 420.

R. 323—Notes—Counsel.—In an application for a *certiorari* or prohibition, only one counsel will be heard: *Ex parte Pollack*, (1907), 7 S.R. (N.S.W.) 648; 24 W.N. 144.

Revenue cases—Crown's right of reply.—On the hearing of a case stated by the Stamp Commissioner, counsel for the Crown has a general right of reply: *White v. Commissioner for Stamps*, (1908), 8 S.R. (N.S.W.) 287.

R. 327.—Rescinded; see Rules of 7th July, 1910, *ante*, p. 91.

S.C.P., p. 421.

R. 337.—Rescinded; see Rules of 7th July, 1910, *ante*, p. 91.

S.C.P., p. 423.

Pauper—Dispaupering order.—Plaintiff, after carrying a case some length as a pauper, got an *ex parte* order, dispaupering himself, as from a date earlier than the order; a summons by the defendant to set aside the order was dismissed with costs: *Watson v. Charles Anderson & Co.*, (1908), 25 W.N. 81.

S.C.P., p. 425.

R. 378—Endorsement "in Chambers."—See cases on amendment, *ante*, p. 107.

S.C.P., p. 427.

Notes on affidavits—Affidavit sworn before Vice-Consul.—An affidavit purporting to be sworn before a British Vice-Consul in France admitted: *Pratt v. Pratt*, (1903), 20 W.N. 219.

Affidavit sworn before notary public, whose signature was verified by a local mayor, held admissible: *Yeend v. Yeend*, (1907), 24 W.N. 58.

S.C.P., p. 434.

R. 425—Set-off of costs.—See *Crowley v. Glissan*, 26 W.N. 131; cited *ante*, p. 109.

S.C.P., p. 436.

Admission of solicitor—R. 428 (b).—As to residence in this State, see now Rules of 15th December, 1904, *ante*, p. 59; 20th December, 1905, *ante*, p. 63; and 3rd September, 1906, *ante*, p. 64.

S.C.P., p. 437.

Admission of solicitors—Articled clerk—Death of master.—An articled clerk, whose master has died, must in future apply to the Court for leave to enter into fresh articles. Where this had not been done, but the executors had assigned the articles to another solicitor, the Court allowed the time served under the assignment to count: *Ex parte Lewis*, (1909), 26 W.N. 70.

S.C.P., pp. 438, 439.

RR. 436, 437.—These Rules are repealed and new Rules substituted by Rules of 10th December, 1912, *ante*, p. 100.

S.C.P., p. 440.

R. 446.—Repealed; see now Rule of 17th December, 1909, *ante*, p. 89.

S.C.P., p. 442.

R. 462—Notice late.—Notice which should have been given on Saturday was not given till the following Monday. The Court allowed the clerk to go up for his examination; but stated that it was not to be a precedent—the Rules must be strictly complied with: *Ex parte an Articled Clerk*, (1906), 23 W.N. 127.

S.C.P., p. 443.

RR. 470, 471.—R. 470 was repealed by Rule of 2nd December, 1909, *ante*, p. 88; and see now Rules of 10th December, 1912, *ante*, p. 100.

S.C.P., p. 443.

R. 476.—Rescinded; see Rules of 7th July, 1910, *ante*, p. 91.

S.C.P., p. 444.

R. 479—Powers of Admission Board.—The Solicitors' Admission Board has power, on sufficient cause shown, to allow the documents mentioned in R. 479 to be filed less than seven days before the last day of term: *In re Rhodes*, (1907), 24 W.N. 122.

S.C.P., p. 445.

R. 483.—Repealed; see now Rule of 2nd December, 1909, *ante*, p. 88.

R. 485.—See Rules of 15th December, 1904, *ante*, p. 59; 20th December, 1905, *ante*, p. 63; and 3rd September, 1906, *ante*, p. 64.

S.C.P., p. 484.

The Service and Execution of Process Act, 1901, was amended by the Act of 1905 (*ante*, p. 48); this latter Act is repealed and further amendments made in the Principal Act by the Service and Execution of Process Act, 1912, (*ante*, p. 49). The sections amended are as follows:—

Principal Act—

s. 3 (b)	.. amended by	.. ..	1912 No. 18, s. 3
s. 4	.. amended by	.. ..	.. s. 4
s. 8..	.. part repealed and substituted by	.. ..	.. s. 5
s. 15 (1)	.. repealed and substituted by	.. ..	.. s. 6
s. 16	.. amended by	.. ..	.. s. 7
s. 18 (1)	.. repealed and substituted by	.. ..	.. s. 8
s. 18 (3) (b)	.. amended by	.. ..	.. s. 8
s. 18 (5)	.. inserted by	.. ..	.. s. 8
s. 21 (2)	.. repealed and substituted by	.. ..	.. s. 9
s. 22A	.. inserted by	.. ..	.. s. 10
Sch. III.	.. amended by	.. ..	.. s. 11
Service and Execution of Process Act, 1905, repealed			
by .. ..	.. ..	.. ..	.. s. 2

S.C.P., p. 485.

Federal Service and Execution of Process Act, s. 5.—A writ issued under the Service and Execution of Processes Act endorsed in accordance with s. 5 (1) of that Act, need not also be endorsed for service out of the jurisdiction under the Common Law Procedure Act: *Pringle v. Musgrove*, (1903), 20 W.N. 280.

A writ will not be set aside because it allows more time for appearance than required by the rules, or because a wrong amount is claimed for costs in default of appearance: *Ib.*

Where there is a cause of action within the jurisdiction of the Court, the Court, under the Service and Execution of Process Act, has jurisdiction over the defendant as to the whole cause of action: *Blunt v. Collingwood Proprietary Co.*, 20 W.N. 158, questioned: *Ib.*

A defendant served with process under the Service and Execution of Process Act, 1901, can apply to set aside the writ before the plaintiff has obtained leave to proceed: *Blunt v. Collingwood Proprietary Tin Mining Co.*, N.L., (1903), 20 W.N. 158.

Section 4 does not extend the jurisdiction of the State Courts, but only authorises service where the State Court had jurisdiction, apart from the provisions of the Service and Execution of Process Act: *Ib.*

S.C.P., p. 486.

Service and Execution of Process Act, 1901, s. 10.—Plaintiff, resident of New South Wales, sued the defendant, a resident of Victoria, in the Supreme Court of New South Wales, for breach of a contract made in Victoria, the writ being issued and served under the Service and Execution of Process Act, 1901; *held*, that the plaintiff, under the circumstances of the case, had chosen a proper forum for the trial of the action, and application by the defendant for security for costs was refused: *Paull v. Pettitt*, (1912), 29 W.N. 44.

S.C.P., p. 488.

Federal Service and Execution of Process Act, s. 15.—Leaving a wife without means of support is not an offence punishable on summary conviction within the meaning of s. 15: *Ex parte Hore*, (1903), 3 S.R. (N.S.W.) 462; 20 W.N. 179.

S.C.P., p. 489.

Federal Service and Execution of Process Act, s. 16.—Leave to serve a *subpoena* under s. 16 of the Service and Execution of Process Act may be obtained from a Judge in Chambers: *Borthwick and Others v. Birt & Co.*, (1908), 25 W.N. 41.

S.C.P., p. 493.

Stay—Federal Service and Execution of Process Act, s. 25.—Proceedings were stayed on a certificate of judgment of the Supreme Court of West Australia, under s. 25 of the Service and Execution of Process Act, for time enough to allow defendant to apply to set aside the writ: *Remilton v. City Mutual Life Assurance Society*, (1907), 24 W.N. 177.

S.C.P., p. 498.

Federal Service and Execution of Process Act, s. 25.—When a certificate of judgment obtained in a Court of Record of any State is produced to the proper officer in another State, that officer is bound to register the certificate, and has no power to inquire into the validity of the judgment. If the original judgment is a nullity, the defendant's remedy is to apply for a stay of proceedings under s. 25 : *Ex parte Penglase*, (1903), 20 W.N. 226 ; see *Mackenzie v. Manwell*, 20 W.N. 18.

Substituted service.

The Court has inherent power to give directions as to the mode of service of an order made by it : *Ex parte Murray*, (1906), 23 W.N. 124 ; see *In re a Solicitor*, 24 W.N. 167.

Remitting action.

Rule *nisi* for a prohibition enlarged ; and substituted service allowed when the informer's whereabouts was unknown : *Ex parte Elizabeth Brown*, (1903), 20 W.N. 245.

Commercial Causes Act.

An application to enter an action for goods sold and delivered on the commercial cause list was refused, on the ground that the case did not come within the 3rd section of the Act : *Stafford v. Gordon Bros.*, (1904), 21 W.N. 229.

Order of Court—Mistake—Case restored to list.

An order having been made by the Court, no counsel appearing for the respondent, it was afterwards discovered that on the interpretation of the section of a statute, which was not cited to the Court, the Court had no jurisdiction to make the order ; on the application of the respondent the matter was restored to the list for further argument : *In re Vandervord*, (1909), 26 W.N. 20.

S.C.P.:—Rolin and Innes' Supreme Court Practice.

PRIVY COUNCIL APPEALS.

JUDICIAL COMMITTEE.

Jurisdiction and Procedure : General Rules as to Appeals.

THE JUDICIAL COMMITTEE RULES, 1908.

AT THE COURT AT BUCKINGHAM PALACE,

The 21st day of December 1908.

Present

THE KING'S MOST EXCELLENT MAJESTY

ARCHBISHOP OF CANTERBURY.

LORD CHAMBERLAIN.

LORD PRESIDENT.

LORD FITZMAURICE.

WHEREAS there was this day read at the Board a representation from the Judicial Committee of the Privy Council in the words following, viz. :—

“ The Lords of the Judicial Committee having taken into consideration the Practice and Procedure in accordance with which the general Appellate Jurisdiction of Your Majesty in Council is now exercised and being of opinion that the Rules regulating the said Practice and Procedure ought to be consolidated and amended Their Lordships do hereby agree humbly to recommend to Your Majesty that with a view to such consolidation and amendment certain Orders of Her late Majesty Queen Victoria in Council regulating the said Practice and Procedure, viz. the Orders in Council dated respectively the 11th day of August 1842 the 13th day of June 1853 the 31st day of March 1855 the 24th day of March 1871 and the 26th day of June 1873 and also the Order of Your Majesty in Council dated the 20th day of March 1905 amending the said Practice and Procedure ought to be revoked and that the several Rules hereunto annexed ought to be substituted therefor.”

HIS MAJESTY having taken the said representation into consideration was pleased by and with the advice of His Privy Council to approve thereof and to order as it is hereby ordered that the said Orders in Council in the said representation mentioned be and the same are hereby revoked and that the Rules hereunto annexed be substituted therefor.

A. W. FITZROY,

Privy Council Appeals.

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Privy Council Appeals.

1.—(1) In these Rules, unless the context otherwise requires :—

Interpretation.

- “ Appeal ” means an Appeal to His Majesty in Council ;
 - “ Judgment ” includes decree, order, sentence, or decision of any Court, Judge, or Judicial Officer ;
 - “ Record ” means the aggregate of papers relating to an Appeal (including the pleadings, proceedings, evidence and judgments) proper to be laid before His Majesty in Council on the hearing of the Appeal ;
 - “ Registrar ” means the Registrar or other proper officer having the custody of the records in the Court appealed from ;
 - “ Abroad ” means the country or place where the Court appealed from is situate ;
 - “ Agent ” means a person qualified by virtue of Her late Majesty’s Order in Council of the 6th March 1896 to conduct proceedings before His Majesty in Council on behalf of another ;
 - “ Party ” and all words descriptive of parties to proceedings before His Majesty in Council (such as “ Petitioner,” “ Appellant,” “ Respondent ”) mean, in respect of all acts proper to be done by an Agent, the Agent of the party in question where such party is represented by an Agent ;
 - “ Month ” means calendar month ;
- Words in the singular shall include the plural, and words in the plural shall include the singular.

(2) Where by these Rules any step is required to be taken in England in connection with proceedings before His Majesty in Council, whether in the way of lodging a Petition or other document, entering an Appearance, lodging security, or otherwise, such step shall be taken in the Registry of the Privy Council, Downing Street, London.

Leave to appeal.

2. All Appeals shall be brought either in pursuance of leave obtained from the Court appealed from, or, in the absence of such leave, in pursuance of special leave to appeal granted by His Majesty in Council upon a Petition in that behalf presented by the intending Appellant.

Leave to appeal generally.

Special Leave to appeal.

3. A Petition for special leave to appeal to His Majesty in Council shall state succinctly and fairly all such facts as it may be necessary to state in order to enable the Judicial Committee to advise His Majesty whether such leave ought to be granted. The Petition shall not travel into extraneous matter, and shall deal with the merits of the case only so far as is necessary for the purpose of explaining and supporting the particular grounds upon which special leave to appeal is sought.

Form of Petition for special leave to appeal.

4. The Petitioner shall lodge at least three copies of his Petition for special leave to appeal together with the Affidavit in support thereof prescribed by Rule 50 hereinafter contained.

Three copies of Petition to be lodged together with Affidavit in support.

Privy Council Appeals.

Time for lodging
Petition.

5. A Petition for special leave to appeal may be lodged at any time after the date of the judgment sought to be appealed from, but the Petitioner shall, in every case, lodge his Petition with the least possible delay.

Security for
costs and trans-
mission of
Record.

6. Where the Judicial Committee agree to advise His Majesty to grant special leave to appeal, they shall, in their Report, specify the amount of the security for costs (if any) to be lodged by the Petitioner, and the period (if any) within which such security is to be lodged and shall, unless the circumstances of a particular case render such a course unnecessary, provide for the transmission of the Record by the Registrar of the Court appealed from to the Registrar of the Privy Council and for such further matters as the justice of the case may require.

General
provisions.

7. Save as by the four last preceding Rules otherwise provided, the provisions of Rules 47 to 50 and 52 to 59 (all inclusive) hereinafter contained shall apply *mutatis mutandis* to Petitions for special leave to appeal.

Petitions for
special leave to
appeal in *forma
pauperis*.

8. Rules 3 to 7 (both inclusive) shall apply *mutatis mutandis* to Petitions for leave to appeal in *forma pauperis*, but in addition to the Affidavit referred to in Rule 4 every such Petition shall be accompanied by an Affidavit from the Petitioner stating that he is not worth £25 in the world excepting his wearing apparel and his interest in the subject-matter of the intended Appeal, and that he is unable to provide sureties, and also by a certificate of Counsel that the Petitioner has reasonable ground of appeal.

Exemption of
pauper
Appellant from
lodging security
and paying
Office fees.

9. Where a Petitioner obtains leave to appeal in *forma pauperis*, he shall not be required to lodge security for the costs of the Respondent or to pay any Council Office fees

Exemption of
unsuccessful
Petitioner for
leave to appeal
in *forma
pauperis* from
payment of
Office fees.

10. A Petitioner whose Petition for leave to appeal in *forma pauperis* is dismissed may, notwithstanding such dismissal, be excused from paying the Council Office fees usually chargeable to a Petitioner in respect of a Petition for leave to appeal, if His Majesty in Council, on the advice of the Judicial Committee, shall think fit so to order.

Record.

Record to be
transmitted
without delay.

11. As soon as an Appeal has been admitted, whether by an Order of the Court appealed from or by an Order of His Majesty in Council granting special leave to appeal, the Appellant shall without delay take all necessary steps to have the record transmitted to the Registrar of the Privy Council.

Printing of
Record.

12. The Record shall be printed in accordance with Rules I. to IV. of Schedule A. hereto. It may be so printed either abroad or in England.

Number of copies
to be
transmitted,
where Record
printed abroad.

13. Where the Record is printed abroad, the Registrar shall, at the expense of the Appellant, transmit to the Registrar of the Privy Council 40 copies of such Record, one of which copies he shall certify to be correct by signing his name on, or initialling, every eighth page thereof and by affixing thereto the seal, if any, of the Court appealed from.

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14. Where the Record is to be printed in England, the Registrar shall, at the expense of the Appellant, transmit to the Registrar of the Privy Council one certified copy of such Record, together with an index of all the papers and exhibits in the case. No other certified copies of the Record shall be transmitted to the Agents in England by or on behalf of the parties to the Appeal.

One certified copy to be transmitted, where Record to be printed in England.

15. Where part of the Record is printed abroad and part is to be printed in England, Rules 13 and 14 shall, as far as practicable, apply to such parts as are printed abroad and such as are to be printed in England respectively.

Record printed partly abroad, partly in England.

16. The reasons given by the judge, or any of the judges, for or against any judgment pronounced in the course of the proceedings out of which the Appeal arises, shall by such judge or judges be communicated in writing to the Registrar and shall by him be transmitted to the Registrar of the Privy Council at the same time when the Record is transmitted

Reasons for judgments to be transmitted.

17. The Registrar, as well as the parties and their Agents, shall endeavour to exclude from the Record all documents (more particularly such as are merely formal) that are not relevant to the subject-matter of the Appeal, and, generally, to reduce the bulk of the Record as far as practicable, taking special care to avoid the duplication of documents and the unnecessary repetition of headings and other merely formal parts of documents; but the documents omitted to be printed or copied shall be enumerated in a list to be placed after the index or at the end of the Record.

Exclusion of unnecessary documents from Record.

18. Where in the course of the preparation of a Record one party objects to the inclusion of a document on the ground that it is unnecessary or irrelevant, and the other party nevertheless insists upon its being included, the Record, as finally printed (whether abroad or in England), shall, with a view to the subsequent adjustment of the costs of and incidental to such document, indicate, in the index of papers, or otherwise, the fact that, and the party by whom, the inclusion of the document was objected to.

Documents objected to to be indicated.

19. As soon as the Record is received in the Registry of the Privy Council, it shall be registered in the said Registry, with the date of arrival, the names of the parties, the date of the judgment appealed from, and the description whether "printed" or "written." A Record, or any part of a Record, not printed in accordance with Rules I. to IV. of Schedule A hereto, shall be treated as written. Appeals shall be numbered consecutively in each year in the order in which the Records are received in the said Registry.

Registration and numbering of Records.

20. The parties shall be entitled to inspect the Record and to extract all necessary particulars therefrom for the purpose of entering an Appearance.

Inspection of Record by parties.

21. Where the Record arrives in England either wholly written, or partly written and partly printed, the Appellant shall, within a period of four months from the date of such arrival in the case of Appeals from Courts situate in any of the countries or places named in Schedule B

Times within which a copy of a written Record shall be bespoken.

Privy Council Appeals.

hereto, and within a period of two months from the same date in the case of Appeals from any other Courts, enter an Appearance and bespeak a type-written copy of the Record, or of such parts thereof as it may be necessary to have copied, and shall engage to pay the cost of preparing such copy at the following rates per folio typed (exclusive of tabular matter)—1½d. per folio of English matter, 2d. per folio of Indian matter, and 3d. per folio of foreign matter.

Notice of
Appearance by
Appellant.

22. The Appellant shall forthwith, after entering his Appearance, give notice thereof to the Respondent, if the latter has entered an Appearance.

Preparation of
copy of Record
for Printer.

23. As soon as the Appellant has obtained the type-written copy of the Record bespoken by him, he shall proceed, with due diligence, to arrange the documents in suitable order, to check the index, to insert the marginal notes and check the same with the index, and, generally, to do whatever may be required for the purpose of preparing the copy for the Printer, and shall, if the Respondent has entered an Appearance, submit the copy, as prepared for the Printer, to the Respondent for his approval. In the event of the parties being unable to agree as to any matter arising under this Rule, such matter shall be referred to the Registrar of the Privy Council, whose decision thereon shall be final.

Lodging copy of
Record for
printing.

24. As soon as the type-written copy of the Record is ready for the Printer, the Appellant shall lodge it, with a request to the Registrar of the Privy Council to cause it to be printed by His Majesty's Printer or by any other printer on the same terms, and shall engage to pay at the price specified in Rule V. of Schedule A. hereto the cost of printing 50 copies thereof, or such other number as in the opinion of the said Registrar the circumstances of the case require.

Special Case.

25. Whenever it shall be found that the decision of a matter on appeal is likely to turn exclusively on a question of law, the parties, with the sanction of the Registrar of the Privy Council, may submit such question of law to the Judicial Committee in the form of a Special case, and print such parts only of the Record as may be necessary for the discussion of the same. Provided that nothing herein contained shall in any way prevent the Judicial Committee from ordering the full discussion of the whole case, if they shall so think fit, and that, in order to promote such arrangements and simplification of the matter in dispute, the said Registrar may call the parties before him, and having heard them, and examined the Record, may report to the Judicial Committee as to the nature of the proceedings.

Examination of
proof of Record
and striking off
copies.

26. The Registrar of the Privy Council shall, as soon as the proof prints of the Record are ready, give notice to all parties who have entered an Appearance requesting them to attend at the Registry of the Privy Council at a time to be named in such notice in order to examine the said proof prints and compare the same with the certified Record, and shall, for that purpose, furnish each of the said parties with one proof print. After the examination has been completed, the Appellant shall, without delay, lodge his proof print, duly corrected and (so far as necessary) approved by the Respondent, and the Registrar of the Privy Council shall thereupon cause the copies of the Record to be struck off from such proof print.

Privy Council Appeals.

27. Each party who has entered an Appearance shall be entitled to receive, for his own use, six copies of the Record.

Number of copies of Record for parties.

28. Subject to any special direction from the Judicial Committee to the contrary, the costs of and incidental to the printing of the Record shall form part of the costs of the Appeal, but the costs of and incidental to the printing of any document objected to by one party, in accordance with Rule 18, shall, if such document is found on the taxation of costs to be unnecessary or irrelevant, be disallowed to, or borne by, the party insisting on including the same in the Record.

How costs of printing Record are to be borne.

Petition of Appeal.

29. The Appellant shall lodge his Petition of Appeal—

Times within which Petition shall be lodged.

- (a) Where the Record arrives in England printed, within a period of four months from the date of such arrival in the case of Appeals from Courts situate in any of the countries or places named in Schedule B. hereto, and within a period of two months from the same date in the case of Appeals from any other Courts ;
- (b) Where the Record arrives in England written, within a period of one month from the date of the completion of the printing thereof :

Provided that nothing in this Rule contained shall preclude an Appellant from lodging his Petition of Appeal prior to the arrival of the Record, if there are special reasons why it should be desirable for him to do so.

30. The Petition of Appeal shall be lodged in the form prescribed by Rule 47 hereinafter contained. It shall recite succinctly and, as far as possible, in chronological order, the principal steps in the proceedings leading up to the Appeal from the commencement thereof down to the admission of the Appeal, but shall not contain argumentative matter or travel into the merits of the case.

Form of Petition

31. The Appellant shall, after lodging his Petition of Appeal, serve a copy thereof without delay on the Respondent, as soon as the latter has entered an Appearance, and shall endorse such copy with the date of the lodgment.

Service of Petition.

Withdrawal of Appeal.

32. Where an Appellant, who has not lodged his Petition of Appeal, desires to withdraw his Appeal, he shall give notice in writing to that effect to the Registrar of the Privy Council, and the said Registrar shall, with all convenient speed after the receipt of such notice, by letter notify the Registrar of the Court appealed from that the Appeal has been withdrawn, and the said Appeal shall thereupon stand dismissed as from the date of the said letter without further Order.

Withdrawal of Appeal before Petition of Appeal has been lodged.

33. Where an Appellant, who has lodged his Petition of Appeal, desires to withdraw his Appeal, he shall present a Petition to that effect to His Majesty in Council. On the hearing of any such Petition a Respondent who has entered an appearance in the Appeal shall, subject to any agreement between him and the Appellant to the contrary, be entitled to apply to the Judicial Committee for his costs, but where the

Withdrawal of Appeal after Petition of Appeal has been lodged.

Privy Council Appeals.

Respondent has not entered an Appearance, or, having entered an Appearance, consents in writing to the prayer of the Petition, the Petition may, if the Judicial Committee think fit, be disposed of in the same way *mutatis mutandis* as a Consent Petition under the provisions of Rule 56 hereinafter contained.

Non-Prosecution of Appeal.

Dismissal of
Appeal where
Appellant takes
no step in
prosecution
thereof.

34. Where an Appellant takes no step in prosecution of his Appeal within a period of four months from the date of the arrival of the Record in England in the case of an Appeal from a Court situate in any of the countries or places named in Schedule B. hereto, or within a period of two months from the same date in the case of an Appeal from any other Court, the Registrar of the Privy Council shall, with all convenient speed, by letter notify the Registrar of the Court appealed from that the Appeal has not been prosecuted, and the Appeal shall thereupon stand dismissed for non-prosecution as from the date of the said letter without further Order.

Dismissal of
Appeal for
non-prosecution
after Appellant's
Appearance and
before lodgment
of Petition of
Appeal.

35. Where an Appellant who has entered an Appearance—

- (a) fails to bespeak a copy of a written Record, or of part of a written Record, in accordance with, and within the periods prescribed by, Rule 21; or
- (b) having bespoken such copy within the periods prescribed by Rule 21, fails thereafter to proceed with due diligence to take all such further steps as may be necessary for the purpose of completing the printing of the said Record; or
- (c) fails to lodge his Petition of Appeal within the periods respectively prescribed by Rule 29;

the Registrar of the Privy Council shall call upon the Appellant to explain his default, and, if no explanation is offered, or if the explanation offered is, in the opinion of the said Registrar, insufficient, the said Registrar shall, with all convenient speed, by letter notify the Registrar of the Court appealed from that the Appeal has not been effectually prosecuted, and the Appeal shall thereupon stand dismissed for non-prosecution as from the date of the said letter without further Order, and a copy of the said letter shall be sent by the Registrar of the Privy Council to all the parties who have entered an Appearance in the Appeal.

Dismissal of
Appeal for
non-prosecution
after lodgment
of Petition of
Appeal.

36. Where an Appellant, who has lodged his Petition of Appeal, fails thereafter to prosecute his Appeal with due diligence, the Registrar of the Privy Council shall call upon him to explain his default, and, if no explanation is offered, or if the explanation offered is, in the opinion of the said Registrar, insufficient, the said Registrar shall issue a Summons to the Appellant calling upon him to show cause before the Judicial Committee at a time to be named in the said Summons why the Appeal should not be dismissed for non-prosecution. Provided that no such Summons shall be issued by the said Registrar before the expiration of one year from the date of the arrival of the Record in England. If the Respondent has entered an Appearance in the Appeal, the Registrar of the Privy Council shall send him a copy of the said Summons, and the Respondent shall be entitled to be heard before the Judicial Committee in the matter of the said Summons at the time named and to ask

Privy Council Appeals.

for his costs and such other relief as he may be advised. The Judicial Committee may, after considering the matter of the said Summons, recommend to His Majesty the dismissal of the Appeal for non-prosecution, or give such other directions therein as the justice of the case may require.

37. An Appellant whose Appeal has been dismissed for non-prosecution may present a Petition to His Majesty in Council praying that his Appeal may be restored.

Restoring an Appeal dismissed for non-prosecution.

Appearance by Respondent.

38. The Respondent may enter an Appearance at any time between the arrival of the Record and the hearing of the Appeal, but if he unduly delays entering an Appearance he shall bear, or be disallowed, the costs occasioned by such delay, unless the Judicial Committee otherwise direct.

Time within which Respondent may appear.

39. The Respondent shall forthwith after entering an Appearance give notice thereof to the Appellant, if the latter has entered an Appearance.

Notice of Appearance by Respondent.

40. Where there are two or more Respondents, and only one, or some, of them enter an Appearance, the Appearance Form shall set out the names of the appearing Respondents.

Form of Appearance where all the Respondents do not appear.

41. Two or more Respondents may, at their own risk as to costs, enter separate Appearances in the same Appeal.

Separate Appearances.

42. A Respondent who has not entered an Appearance shall not be entitled to receive any notices relating to the Appeal from the Registrar of the Privy Council, nor be allowed to lodge a Case in the Appeal.

Non-appearing Respondent not entitled to receive notices or lodge Case.

43. Where a Respondent fails to enter an Appearance in an Appeal, the following Rules shall, subject to any special Order of the Judicial Committee to the contrary, apply :—

Procedure on non-appearance of Respondent.

- (a) If the non-appearing Respondent was a Respondent at the time when the Appeal was admitted, whether by the Order of the Court appealed from or by an Order of His Majesty in Council giving the Appellant special leave to appeal, and it appears from the terms of the said Order, or Order in Council, or otherwise from the Record, or from a Certificate of the Registrar of the Court appealed from, that the said non-appearing Respondent has received notice, or was otherwise aware, of the Order of the Court appealed from admitting the Appeal, or of the Order of His Majesty in Council giving the Appellant special leave to appeal, and has also received notice, or was otherwise aware, of the dispatch of the Record to England, the Appeal may be set down *ex parte* as against the said non-appearing Respondent at any time after the expiration of three months from the date of the lodging of the Petition of Appeal ;
- (b) if the non-appearing Respondent was made a Respondent by an Order of His Majesty in Council subsequently to the admission of the Appeal, and it appears from the Record, or from a Supplementary Record, or from a Certificate of the Registrar

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of the Court appealed from, that the said non-appearing Respondent has received notice, or was otherwise aware, of any intended application to bring him on the Record as a Respondent, the Appeal may be set down *ex parte* as against the said non-appearing Respondent at any time after the expiration of three months from the date on which he shall have been served with a copy of His Majesty's Order in Council bringing him on the Record as a Respondent.

Provided that where it is shown to the satisfaction of the Judicial Committee, by Affidavit or otherwise, either that an Appellant has made every reasonable endeavour to serve a non-appearing Respondent with the notices mentioned in clauses (a) and (b) respectively and has failed to effect such service, or that it is not the intention of the non-appearing Respondent to enter an Appearance to the Appeal, the Appeal may, without further Order in that behalf and at the risk of the Appellant, be proceeded with *ex parte* as against the said non-appearing Respondent.

Respondent
defending
Appeal in *forma
pauperis*.

44. A Respondent who desires to defend an Appeal *in forma pauperis* may present a Petition to that effect to His Majesty in Council, which Petition shall be accompanied by an Affidavit from the Petitioner stating that he is not worth £25 in the world excepting his wearing apparel and his interest in the subject-matter of the Appeal.

Petitions generally.

Mode of
addressing
Petitions.

45. All Petitions for orders or directions as to matters of practice or procedure arising after the lodging of the Petition of Appeal and not involving any change in the parties to an Appeal shall be addressed to the Judicial Committee. All other Petitions shall be addressed to His Majesty in Council, but a Petition which is properly addressed to His Majesty in Council may include, as incidental to the relief thereby sought, a prayer for orders or directions as to matters of practice or procedure.

Orders on
Petitions which
need not be
drawn up.

46. Where an Order made by the Judicial Committee does not embody any special terms or include any special directions, it shall not be necessary to draw up such Order, unless the Committee otherwise direct, but a Note thereof shall be made by the Registrar of the Privy Council.

Form of Petition.

47. All Petitions shall consist of paragraphs numbered consecutively and shall be written, type-written, or lithographed, on brief paper with quarter margin and endorsed with the name of the Court appealed from, the short title and Privy Council number of the Appeal to which the Petition relates or the short title of the Petition (as the case may be), and the name and address of the London Agent (if any) of the Petitioner, but need not be signed. Petitions for special leave to appeal may be printed and, shall, in that case, be printed in the form known as Demy Quarto or other convenient form.

Caveat.

48. Where a petition is expected to be lodged, or has been lodged, which does not relate to any pending Appeal of which the Record has been registered in the Registry of the Privy Council, any person claiming a right to appear before the Judicial Committee on the hearing of such

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Petition may lodge a Caveat in the matter thereof, and shall thereupon be entitled to receive from the Registrar of the Privy Council notice of the lodging of the Petition, if at the time of the lodging of the Caveat such Petition has not yet been lodged, and, if and when the Petition has been lodged, to require the Petitioner to serve him with a copy of the Petition, and to furnish him, at his own expense, with copies of any papers lodged by the Petitioner in support of his Petition. The Caveator shall forthwith after lodging his Caveat give notice thereof to the Petitioner, if the Petition has been lodged.

49. Where a Petition is lodged in the matter of any pending Appeal of which the Record has been registered in the Registry of the Privy Council, the Petitioner shall serve any party who has entered an Appearance in the Appeal with a copy of such Petition, and the party so served shall thereupon be entitled to require the Petitioner to furnish him, at his own expense, with copies of any papers lodged by the Petitioner in support of his Petition.

Service of
Petition.

50. A Petition not relating to any Appeal of which the Record has been registered in the Registry of the Privy Council, and any other Petition containing allegations of fact which cannot be verified by reference to the registered Record or any certificate or duly authenticated statement of the Court appealed from, shall be supported by Affidavit. Where the Petitioner prosecutes his Petition in person, the said Affidavit shall be sworn by the Petitioner himself and shall state that, to the best of the deponent's knowledge, information, and belief, the allegations contained in the petition are true. Where the Petitioner is represented by an Agent, the said Affidavit shall be sworn by such Agent and shall, besides stating that, to the best of the deponent's knowledge, information, and belief, the allegations contained in the Petition are true, show how the deponent obtained his instructions and the information enabling him to present the Petition.

Verifying
Petition by
Affidavit.

51. A Petition for an Order of Revivor or Substitution shall be accompanied by a certificate or duly authenticated statement from the Court appealed from showing who, in the opinion of the said Court, is the proper person to be substituted, or entered, on the Record in place of, or in addition to, a party who has died or undergone a change of status.

Petition for
Order of Revivor
or Substitution.

52. The Registrar of the Privy Council may refuse to receive a Petition on the ground that it contains scandalous matter, but the Petitioner may appeal, by way of motion, from such refusal to the Judicial Committee.

Petition
containing
scandalous
matter
to be refused.

53. As soon as a Petition is ready for hearing, the Petitioner shall forthwith notify the Registrar of the Privy Council to that effect, and the Petition shall thereupon be deemed to be set down.

Setting down
Petition.

54. On each day appointed by the Judicial Committee for the hearing of Petitions the Registrar of the Privy Council shall, unless the Committee otherwise direct, put in the paper for hearing all such Petitions as have been set down. Provided that, in the absence of special circumstances of urgency to be shown to the satisfaction of the said Registrar,

Times within
which set-down
Petitions shall
be heard.

Privy Council Appeals.

no Petition, if unopposed, shall be so put in the paper before the expiration of three clear days from the lodging thereof, or, if opposed, before the expiration of ten clear days from the lodging thereof unless, in the latter case, the Opponent consents to the Petition being put in the paper on an earlier day not being less than three clear days from the lodging thereof.

Notice to parties
of day fixed for
hearing Petition.

55. Subject to the provisions of the next following Rule, the Registrar of the Privy Council shall, as soon as the Judicial Committee have appointed a day for the hearing of a Petition, notify all parties concerned by Summons of the day so appointed.

Procedure where
Petition is
consented to or
is formal.

56. Where the prayer of a Petition is consented to in writing by the opposite party, or where a Petition is of a formal and non-contentious character, the Judicial Committee may, if they think fit, make their Report to His Majesty on such Petition, or make their Order thereon, as the case may be, without requiring the attendance of the parties in the Council Chamber, and the Registrar of the Privy Council shall not in any such case issue the Summons provided for by the last-preceding Rule, but shall with all convenient speed after the Committee have made their Report or Order notify the parties that the Report or Order has been made and of the date and nature of such Report or Order.

Withdrawal of
Petition.

57. A Petitioner who desires to withdraw his Petition shall give notice in writing to that effect to the Registrar of the Privy Council. Where the Petition is opposed, the Opponent shall, subject to any agreement between the parties to the contrary, be entitled to apply to the Judicial Committee for his costs, but where the Petition is unopposed, or where, in the case of an opposed Petition, the parties have come to an agreement as to the Costs of the Petition, the Petition may, if the Judicial Committee think fit, be disposed of in the same way *mutatis mutandis* as a Consent Petition under the provisions of the last-preceding Rule.

Procedure where
hearing of
Petition unduly
delayed.

58. Where a Petitioner unduly delays bringing a Petition to a hearing, the Registrar of the Privy Council shall call upon him to explain the delay, and, if no explanation is offered, or if the explanation offered is, in the opinion of the said Registrar, insufficient, the said Registrar may treat the said Petition as set down and may, after duly notifying all parties interested by Summons of his intention to do so, put the Petition in the Paper for hearing on the next following day appointed by the Judicial Committee for the hearing of Petitions for such directions as the Committee may think fit to give thereon.

Only one Counsel
heard on a side
in Petitions.

59. At the hearing of a Petition not more than one Counsel shall be admitted to be heard on a side.

Case.

Lodging of Case.

60. No party to an Appeal shall be entitled to be heard by the Judicial Committee unless he has previously lodged his Case in the Appeal. Provided that where a Respondent is merely a stakeholder or trustee with no other interest in the Appeal, he may give the Registrar of the Privy Council notice in writing of his intention not to lodge any Case, while reserving his right to address the Judicial Committee on the question of costs.

Privy Council Appeals.

61. The Case may be printed either abroad or in England, and shall, in either event, be printed in accordance with Rules I. to IV. of Schedule A. hereto, every tenth line thereof being numbered in the margin, and shall be signed by at least one of the Counsel who attends at the hearing of the Appeal or by the party himself if he conducts his Appeal in person.

Printing of Case.

62. Each party shall lodge 40 prints of his Case.

Number of prints to be lodged.

63. The Case shall consist of paragraphs numbered consecutively and shall state, as concisely as possible, the circumstances out of which the Appeal arises, the contentions to be urged by the party lodging the same, and the reasons of appeal. References by page and line to the relevant portions of the Record as printed shall, as far as practicable, be printed in the margin, and care shall be taken to avoid, as far as possible, the reprinting in the case of long extracts from the Record. The taxing officer, in taxing the costs of the Appeal, shall, either of his own motion, or at the instance of the opposite party, inquire into any unnecessary prolixity in the Case, and shall disallow the costs occasioned thereby.

Form of Case.

64. Two or more Respondents may, at their own risk as to costs, lodge separate Cases in the same Appeal.

Separate Cases by two or more Respondents.

65. Each party shall, after lodging his Case, forthwith give notice thereof to the other party.

Notice of lodgment of Case.

66. Subject as hereinafter provided, the party who lodges his Case first may, at any time after the expiration of three clear days from the day on which he has given the other party the notice prescribed by the last-preceding Rule, serve such other party, if the latter has not in the meantime lodged his Case, with a "Case Notice," requiring him to lodge his Case within one month from the date of the service of the said Case Notice and informing him that, in default of his so doing, the Appeal will be set down for hearing *ex parte* as against him, and if the other party fails to comply with the said Case Notice, the party who has lodged his case may, at any time after the expiration of the time limited by the said Case Notice for the lodging of the Case, lodge an affidavit of Service (which shall set out the terms of the said Case Notice), and the Appeal shall thereupon, if all other conditions of its being set down are satisfied, be set down *ex parte* as against the party in default. Provided that no case notice shall be served until after the completion of the printing of the Record and that it shall be open to the Taxing Officer, in adjusting the costs of the Appeal, to inquire, generally, into the circumstances in which the said Case Notice was served and, if satisfied that there was no reasonable necessity for the said Case Notice, to disallow the costs thereof to the party serving the same. Provided also that nothing in this Rule contained shall preclude the party in default from lodging his Case, at his own risk as regards costs and otherwise, at any time up to the date of hearing.

Case Notice.

67. Subject to the provisions of Rule 43 and of the last-preceding Rule, an Appeal shall be set down *ipso facto* as soon as the Cases on both sides are lodged, and the parties shall thereupon exchange Cases by

Setting down Appeal and exchanging Cases.

Privy Council Appeals.

handing one another, either at the Offices of one of the Agents or in the Registry of the Privy Council, ten copies of their respective Cases.

Binding Records, &c.

Mode of binding
Records, etc., for
use of Judicial
Committee.

68. As soon as an Appeal is set down, the Appellant shall attend at the Registry of the Privy Council and obtain ten copies of the Record and Cases to be bound for the use of the Judicial Committee at the hearing. The copies shall be bound in cloth or in half leather with paper sides, and six leaves of blank paper shall be inserted before the Appellant's Case. The front cover shall bear a printed label stating the title and Privy Council number of the Appeal, the contents of the volume, and the names and addresses of the London Agents. The several documents, indicated by incuts, shall be arranged in the following order: (1) Appellant's Case; (2) Respondent's Case; (3) Record; (4) Supplemental Record (if any); and the short title and Privy Council number of the Appeal shall also be shown on the back.

Time within
which bound
copies shall be
lodged.

69. The Appellant shall lodge the bound copies not less than four clear days before the commencement of the Sittings during which the Appeal is to be heard.

Hearing.

Notice to parties
of date of
commencement
of Sittings;
entering Appeals
for hearing.

70. As soon as the Judicial Committee have appointed a day for the commencement of the Sittings for the hearing of Appeals, the Registrar of the Privy Council shall, as far as in him lies, make known the day so appointed to the Agents of all parties concerned, and shall name a day on or before which Appeals must be set down if they are to be entered in the List of Business for such Sittings. All Appeals set down on or before the day named shall, subject to any directions from the Committee or to any agreement between the parties to the contrary, be entered in such list of Business and shall, subject to any direction from the Committee to the contrary, be heard in the order in which they are set down.

Notice to parties
of day fixed for
hearing Appeal.

71. The Registrar of the Privy Council shall, subject to the provisions of Rule 42, notify the parties to each Appeal by Summons, at the earliest possible date, of the day appointed by the Judicial Committee for the hearing of the Appeal, and the parties shall be in readiness to be heard on the day so appointed.

Only two Counsel
heard on a side
in Appeals.

72. At the hearing of an Appeal not more than two Counsel shall be admitted to be heard on a side.

Nautical
Assessors.

73. In Admiralty Appeals the Judicial Committee may, if they think fit, require the attendance of two Nautical Assessors.

Judgment.

Notice to parties
of day fixed for
delivery of
Judgment.

74. Where the Judicial Committee, after hearing an Appeal, decide to reserve their Judgment thereon, the Registrar of the Privy Council shall in due course notify the parties who attended the hearing of the Appeal by Summons of the day appointed by the Committee for the delivery of the Judgment.

Privy Council Appeals.

Costs.

75. All Bills of Costs under the Orders of the Judicial Committee on Appeals, Petitions, and other matters, shall be referred to the Registrar of the Privy Council, or such other person as the Judicial Committee may appoint, for taxation, and all such taxations shall be regulated by the Schedule of Fees set forth in Schedule C. hereto.

Taxation of Costs.

76. The taxation of costs in England shall be limited to costs incurred in England.

What costs taxed in England.

77. The Registrar of the Privy Council shall, with all convenient speed after the Judicial Committee have given their decision as to the costs of an Appeal, Petition, or other matter, issue to the party to whom costs have been awarded an Order to tax and a Notice specifying the day and hour appointed by him for taxation. The party receiving such Order to tax and Notice shall, not less than 48 hours before the time appointed for taxation, lodge his Bill of Costs (together with all necessary vouchers for disbursements), and serve the opposite party with a copy of his Bill of Costs and of the Order to tax and Notice.

Order to tax.

78. The Taxing Officer may, if he think fit, disallow to any party who fails to lodge his Bill of Costs (together with all necessary vouchers for disbursements) within the time prescribed by the last-preceding Rule, or who in any way delays or impedes a taxation, the charges to which such party would otherwise be entitled for drawing his Bill of Costs and attending the taxation.

Power of Taxing Officer where taxation delayed through the fault of the party whose costs are to be taxed.

79. Any party aggrieved by a taxation may appeal from the decision of the Taxing Officer to the Judicial Committee. The Appeal shall be heard by way of motion, and the party appealing shall give three clear days' Notice of Motion to the opposite party, and shall also leave a copy of such Notice in the Registry of the Privy Council.

Appeal from decision of Taxing Officer.

80. The amount allowed by the Taxing Officer on the taxation shall, subject to any appeal from his taxation to the Judicial Committee and subject to any direction from the Committee to the contrary, be inserted in His Majesty's Order in Council determining the Appeal or Petition.

Amount of taxed costs to be inserted in His Majesty's Order in Council

81. Where the Judicial Committee directs costs to be taxed on the pauper scale, the Taxing Officer shall not allow any fees of Counsel, and shall only award to the Agents out-of-pocket expenses and a reasonable allowance to cover office expenses, such allowance to be taken at about three-eighths of the usual professional charges in ordinary Appeals.

Taxation on the pauper scale.

82. Where the Appellant has lodged security for the Respondent's costs of an Appeal in the Registry of the Privy Council, the Registrar of the Privy Council shall deal with such security in accordance with the directions contained in His Majesty's Order in Council determining the Appeal.

Security to be dealt with as His Majesty's Order in Council determining Appeal directs.

Miscellaneous.

83. The Judicial Committee may, for sufficient cause shown, excuse the parties from compliance with any of the requirements of these Rules, and may give such directions in matters of practice and procedure as they shall consider just and expedient. Applications to be

Power of Judicial Committee to excuse from compliance with Rules.

Privy Council Appeals.

excused from compliance with the requirements of any of these Rules shall be addressed in the first instance to the Registrar of the Privy Council, who shall take the instructions of the Committee thereon and communicate the same to the parties. If, in the opinion of the said Registrar, it is desirable that the application should be dealt with by the Committee in open Court, he may, and if he receives a written request in that behalf from any of the parties, he shall, put the application in the paper for hearing before the Committee at such time as the Committee may appoint, and shall give all parties interested Notice of the time so appointed.

Amendment of documents.

84. Any document lodged in connection with an Appeal, Petition, or other matter pending before His Majesty in Council or the Judicial Committee, may be amended by leave of the Registrar of the Privy Council, but if the said Registrar is of opinion that an application for leave to amend should be dealt with by the Committee in open Court, he may, and if he receives a written request in that behalf from any of the parties, he shall, put such application in the paper for hearing before the Committee at such time as the Committee may appoint, and shall give all parties interested Notice of the time so appointed.

Affidavits may be sworn before the Registrar of the Privy Council.

85. Affidavits relating to any Appeal, Petition, or other matter pending before His Majesty in Council or the Judicial Committee may be sworn before the Registrar of the Privy Council.

Change of Agent.

86. Where a party to an Appeal, Petition, or other matter pending before His Majesty in Council change his Agent, such party, or the New Agent, shall forthwith give the Registrar of the Privy Council notice in writing of the change.

Scope of application of Rules.

87. Subject to the provisions of any Statute or of any Statutory Rule or Order to the contrary, these Rules shall apply to all matters falling within the Appellate Jurisdiction of His Majesty in Council.

Mode of citation and date of operation.

88. These Rules may be cited as the Judicial Committee Rules, 1908, and they shall come into operation on the 1st day of January 1909.

Schedule A.

Rules as to Printing.

I. All Records and other proceedings in Appeals or other matters pending before His Majesty in Council or the Judicial Committee which are required by the above Rules to be printed shall henceforth be printed in the form known as Demy Quarto (*i.e.*, 54 ems in length and 42 in width).

II. The size of the paper used shall be such that the sheet, when folded and trimmed, will be 11 inches in height and 8½ inches in width.

III. The type to be used in the text shall be Pica type, but Long Primer shall be used in printing accounts, tabular matter, and notes.

IV. The number of lines in each page of Pica type shall be 47 or thereabouts, and every tenth line shall be numbered in the margin.

V. The price in England for the printing by His Majesty's Printer of 50 copies in the form prescribed by these Rules shall be 38s. per sheet (eight pages) of pica with marginal notes, not including corrections, tabular matter, and other extras.

Privy Council Appeals.

Schedule B.

Countries and Places referred to in Rules 21, 29, and 34.

Australia (and the constituent States thereof).
 Basutoland.
 British East Africa.
 British Honduras.
 British North Borneo.
 Brunei.
 Ceylon.
 China.
 Eastern African-Protectorates.
 Falkland Islands.
 Federated Malay States.
 Fiji.
 Hong Kong.
 India.
 Mauritius.
 New Zealand.
 Persia.
 Seychelles.
 Somaliland Protectorate.
 Straits Settlements.
 Zanzibar.

Schedule C.

I.

Fees allowed to Agents conducting Appeals or other matters before the Judicial Committee of the Privy Council.

	£	s.	d.
Retaining Fee	0	13	4
Perusing written Record, at the rate of, for every 25 folios	0	6	8
Perusing printed Record, at the rate of, for every printed sheet of 8 pages	1	1	0
Attendances at the Council Office, or elsewhere, on ordinary business, such as to enter an Appearance, to make a search, to lodge a Petition or Affidavit, or to retain Counsel	0	10	0
Attending at the Council Office to examine proof print of Record with the certified Record <i>per diem</i>	3	3	0
Attending at the Council Chamber on Summons for the hearing of a Petition	1	6	8
Attending at the Council Chamber all day on an Appeal not called on	2	6	8
Attending the Hearing of an Appeal <i>per diem</i>	3	6	8
Attending a Judgment	1	6	8
Correcting English proofs, at the rate of, for every printed sheet of 8 pages	0	10	6
Correcting Foreign or Indian proofs, at the rate of, for every printed sheet of 8 pages	1	1	0
Instructions for Petition	0	10	0
Drawing Petition, Case, or Affidavit <i>per folio</i>	0	2	0
Copying Petition, Case, or Affidavit <i>per folio</i>	0	0	6
Instructions for Case	1	0	0
Instructions to Counsel to argue an Appeal	1	0	0
Instructions to Counsel to argue a Petition	0	10	0
Attending Consultation	1	0	0
Sessions Fee for each year or part of a year from the date of Appearance	3	3	0
Drawing Bill of Costs <i>per folio</i>	0	1	0
Copying Bill of Costs <i>per folio</i>	0	0	6
Attending Taxation of Costs of an Appeal	2	2	0
Attending Taxation of Costs of a Petition	1	1	0

Privy Council Appeals.

II.

Council Office Fees.

	£	s.	d.
Entering Appearance	0	10	0
Lodging Petition of Appeal	2	0	0
Lodging any other Petition	1	0	0
Lodging Case	1	0	0
Setting down Appeal (chargeable to Appellant only)	2	0	0
Setting down Petition (chargeable to Petitioner only)	1	0	0
Summons	0	10	0
Committee Report	1	10	0
Original Order of His Majesty in Council determining an Appeal	4	0	0
Any other Original Order of His Majesty in Council	2	0	0
Plain Copy of an Order of His Majesty in Council	0	5	0
Original Order of the Judicial Committee	1	10	0
Plain Copy of Committee Order	0	5	0
Lodging Affidavit	0	10	0
Certificate delivered to Parties	0	10	0
Committee References	2	0	0
Lodging Caveat	1	0	0
Subpoena to Witnesses	0	10	0
Taxing Fee in Appeals	3	0	0
Taxing Fee in Petitions	2	0	0

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